

PRIVACY, CONSTITUTIONS AND THE LAW OF
TORTS: A COMPARATIVE AND THEORETICAL
ANALYSIS OF PROTECTING PERSONAL
INFORMATION AGAINST DISSEMINATION IN
NEW ZEALAND, THE UK AND THE USA

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ABSTRACT

The New Zealand Court of Appeal has recently acknowledged the existence of a freestanding tort of invasion of privacy in *Hosking v Runting*. The tort is in its infancy and the courts are still grappling with essential problems, the most prominent of which is the conflict with countervailing interests in freedom of speech. In need of guidance, the courts turn to overseas authorities, predominantly from the United Kingdom and the United States of America. The commonly found descriptive nature of the comparison invites a broader analysis of these jurisdictions.

In this thesis, I offer a theoretically informed comparative law analysis of New Zealand's new tort with the American public disclosure of private facts tort and the British extended breach of confidence action. In all three jurisdictions, the conflict of privacy with individual and societal concerns in freedom of speech has led to an extension of (quasi-) constitutional norms derived, for instance, from the New Zealand Bill of Rights Act 1990 into the common law sphere – the horizontal effect. The horizontal application of constitutional rights poses significant legal problems to the common law, because it has learned to deal with duties rather than rights. The time has come to reconsider the nature of rights in both constitutional and tort law. The comparison shows that New Zealand has effectively adopted two torts – one following the duty-based lead of the United States of America and an alternative modelled along the lines of the more rights-orientated British law. The law of the United Kingdom and the USA differ to a degree that calls their comparability into question. I present the preferable British approach as a 'constitutionalised common law tort of privacy.' The results also show that this model represents a competitive third way to traditional solutions based on common law or statute by means of utilising a statutory human rights instrument as an analytical framework for the common law.

CHAPTER ONE - INTRODUCTION

Smith: Privacy is a very valuable thing. Everyone wants a place where they could be alone occasionally. And when they have such a place, it is only common courtesy in anyone else who knows of it to keep his knowledge for himself.¹

Palmer: Unfortunately privacy has some unruly qualities. There is a tendency for people to rush about all over the place and raise the privacy flag, saying you must not do this and you must not do that or you will be invading privacy.²

Sir Geoffrey Palmer, of course, never had this conversation with Winston Smith, the reluctant hero of George Orwell's caco-topia '1984.' Sir Geoffrey was nevertheless a key figure behind the New Zealand Bill of Rights Act 1990, which will be of significant importance in the following. As an eminently important right, freedom of speech has been affirmed in the Act whilst a right of privacy was omitted. Winston's interest, as it were, is not directly protected in New Zealand. Privacy, it was thought, was a nebulous concept with uncertain boundaries and its affirmation would have had perilous consequences for the protection of other interests.³ However, this stance has recently been subject to reconsideration.⁴ Under the presidency of Sir Geoffrey, the New Zealand Law Commission has begun an extensive general review of the law concerning privacy and the first results are very impressive.

The elusiveness of the concept of privacy is indeed almost proverbial and the following analysis is much narrower in focus, viz, confined to the dissemination of personal or private information. Alas, the notion of disseminating private information is also particularly problematic due to an unavoidable encounter with interests in freedom of speech. Pending further consideration given by the Supreme Court, a common law

¹ Adapted from the beginning of part 2 chapter IV of George Orwell's *Nineteen Eighty-Four* (Everyman's Library, 1992) 144.

² G Palmer, 'Privacy and the Law' [1975] *New Zealand Law Journal* 747, 748.

³ See Minister of Justice, A Bill of Rights for New Zealand - A White Paper (1985) para 10.144 ('White Paper').

⁴ Privacy: concepts and issues: review of the Law of Privacy part 1 (New Zealand Law Commission Study Paper; 19), para 4.107 (p 96).

tort of privacy has nevertheless been acknowledged in the landmark decision of *Hosking v Runting*⁵. At the heart of this tort lies the outlined conflict – the need for individual privacy and its reconciliation with the demands of societal life, for instance, in freedom of speech. Three main categories may suffice to sketch the contours of the problem.

Firstly, many would agree that the things Winston mentioned are important and probably worth protecting. Neither do we want uninvited strangers intruding on these places we perhaps instinctively call ‘private’ nor do we want these people to trumpet to the world what they might have found out. Privacy is dear under these circumstances, in fact so precious that some might even want to stop ‘people from talking about you.’⁶ The freedom of speech that enables us to talk freely about truthful matters will usually not have much force when it is pitted against Winston’s personal interest in hiding these facts from the public gaze. Our protagonist, as is well known, nevertheless intended to use his newly found privacy to engage in illicit sexual activity. Despite the intensely intimate nature of the information at issue, all things forbidden usually attract an interest to impart and receive information about them. As a result, the solution to this seemingly clear example defies an unambiguous answer.

One can be almost sure, however, that this category was not what worried Sir Geoffrey, who reminds us that the tirelessly invoked Big Brother is indeed just around the corner if privacy is raised as a defence to every attack.⁷ His concern seems to centre on where ‘the line’ is to be drawn once this can of worms has been opened. This leads us to our second example. Given that Winston has found the private place he was looking for, as soon as he leaves the doorstep his actions may attract the attention of his social environment. Linguistically at least, it seems doubtful whether there could be such a thing as privacy in a public place. If he just walks the street back and forth, his neighbours seem perfectly entitled to discuss his actions freely as this is a normal inci-

⁵ [2005] 1 NZLR 1 (CA) (“Hosking”).

⁶ This phrase was coined by E Volokh, ‘Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You’ (2000) 52 *Stanford Law Review* 1049.

⁷ See J Black, ‘Privacy: To every attack a Defence’ published on 22 July 2003 in *Business Newsweek* <http://www.businessweek.com/technology/content/jul2003/tc20030722_9870_PG3_tc125.htm> 02 December 2006).

dent of social life. Privacy interests, on the other hand, may be regarded as relinquished. Notwithstanding these daily activities, one's judgment would perhaps differ if he was involved in an accident which exposed shocking or piquant details of his bodily appearance. The answer to these cases seems to be shrouded in fog, because the nature of the location may not be an all-consuming factor. An Australian court has consequently held that a bright line cannot be drawn between private facts and public facts;⁸ there is a large area of in-between stages, which is why the conundrum seems to lie in the solution of the speech/privacy conflict in these cases.

Lastly, the situation seems straightforward again if Winston decides to enter into political activities. His actions, then, no longer only affect his affairs, but also those of his neighbours and the community he lives in. Thus, many would agree that his privacy interest would not have much force when it is pitted against his neighbours' interest in knowing certain things about him. One argument against subjecting politicians to relentless scrutiny contends, however, that able minds might be unwilling to enter into politics if the complete loss of one's private life is the price to pay.⁹ A degree of privacy may be important even to so-called public figures and a bright line is, once more, difficult to draw.

In brief, the two positions represented in the fictional dialogue between Sir Geoffrey and Winston may not be mutually exclusive, but particularly how interests in privacy and freedom of speech should be reconciled in an inherently coherent manner is an onerous task. 'It depends,' is perhaps the most suitable answer, because it would allude to the contextual sensitivity of the conflict. We may nevertheless extrapolate two key themes from the previous three examples: firstly, plaintiffs just 'waving the privacy flag' have to be distinguished from those claiming legitimate interferences with their privacy interests; secondly, given that this problem could be solved,¹⁰ a resolution to

⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226 (HC).

⁹ See *Hosking* [2005] 1 NZLR 1 (CA) para 239 per Tipping J.

¹⁰ Many scholars have observed the vagueness of privacy – see, eg, D J Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 478 for further details.

the equally intricate conflict with countervailing interests in freedom of expression needs to be found.¹¹

This thesis seeks to offer a comparative survey and analysis of the response to these issues in the jurisdictions of New Zealand, the United Kingdom¹² and the United States of America.¹³ The analysis concentrates on tort law regulating the relationships between private persons, more specifically New Zealand's recently acknowledged invasion of privacy tort, the US public disclosure of private facts tort¹⁴ and the - strictly speaking - equitable remedy known as extended breach of confidence in English and Welsh law.¹⁵ Nevertheless, the discussion is not confined to the law of torts. All three jurisdictions have at least one feature in common: they fall back upon constitutional norms in order to solve the aforementioned conflict between freedom of speech and privacy. The analysis will therefore pay due regard to this constitutional dimension.

Three issues need to be clarified before we may start the analysis. First, I must outline the analytical approach. When Lord Steyn gave the inaugural Robin Cooke Lecture at Victoria University of Wellington, he mentioned that 'comparative law has come of age' due to the European dimension of British law.¹⁶ What does comparative law mean in this context? Essentially, the analysis will proceed in two parts distinguishing a macro-level comparison from a micro-level comparison. Aside from descriptive elements, both levels provide a material or dogmatic comparison of the jurisdictions involved.

¹¹ Many scholars acknowledge that this problem is perhaps the most difficult and crucial to the success of the law – eg, G Phillipson, 'The 'right' of privacy in England and Strasbourg compared' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 212-3.

¹² Hereinafter 'the UK.' Note that this is not a reference to the United Kingdom of Great Britain and Northern Ireland. The term 'UK' or 'UK common law' used in this analysis refers to the common law as applied in England and Wales. When the present writer sometimes refers only to England, it is always meant to have the same implication for the common law as applied in Wales.

¹³ Hereinafter interchangeably USA, US or America. Note that the term 'common law' in the context of this country might be a misnomer – see K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir trans, 3rd ed, 1998) 238-55 for a brief introduction. However, many American scholars and judges seem to regard their tort regime as common law. For the sake of transparency, this view is to some extent shared in the following.

¹⁴ Note that this tort will also be addressed as 'private facts tort' or 'public disclosure tort.'

¹⁵ Extended breach of confidence is functionally equivalent to a tort of privacy and is therefore an appropriate subject of comparative law - K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir trans, 3rd ed, 1998) 34.

¹⁶ Lord Steyn, 'Democracy through Law' [2002] *European Human Rights Law Review* 723, 736.

The macro-level will address the constitutional or quasi-constitutional framework in each jurisdiction, that is, the framework provided by the United States Constitution, the New Zealand Bill of Rights Act 1990 and the English Human Rights Act 1998. The importance of constitutional norms influencing the private law sphere will be illustrated briefly as follows: judges and scholars commenting on the protection of privacy in relevant American tort law often conclude that this interest has faded into insignificance under the might of the First Amendment to the United States Constitution protecting, among others, the freedom of speech.¹⁷ While correct, these suggestions occasionally ride roughshod over the fact that the First Amendment is part of the United States Bill of Rights. It does not seem evident, however, why the litigation of private persons governed by common law is influenced by a constitutional provision. As is well known, constitutional rights primarily regulate the vertical relationship between the state and those who are governed by the state.¹⁸ Freedom of speech, in contrast, has also long been protected as a principle of the common law. Granted that the First Amendment (as opposed to the common law principle) has obliterated the protection of possible privacy interests in the law of torts, it could be argued that the constitutional norm had been applied horizontally, that is to say that it governs additionally the relationship between two private persons. A similar observation can be made with regard to the relevant context of the common law in the UK and New Zealand; it will be addressed as the ‘constitutionalisation of private law.’ Particularly in New Zealand, however, it is generally held that the common law determines the interpretation of quasi-constitutional rights and not vice versa. The macro-analysis of the constitutional framework will therefore provide insights into the implications of extending (quasi-) constitutional norms to the common law sphere by means of their horizontal application. This inquiry will predominantly deal with questions about the nature and concept of rights as well as different balancing techniques in order to place limits on these rights. I hope to demonstrate that different constitutional frameworks have significantly different implications for the common law.

¹⁷ Eg, Sir S Sedley, ‘Sex, Libels and Video-surveillance’ (The Blackstone Lecture 2006) available at www.judiciary.gov.uk/publications_media/speeches/2006/sp130506, last accessed on 16 January 2008.

¹⁸ Eg, Lord Steyn, ‘Democracy through Law’ [2002] *European Human Rights Law Review* 723, 733.

The analysis on the micro-level, by contrast, is concerned with the private law sphere, viz, with common law and equity including aspects of respective adjudication techniques. Apart from attempting to show the transformative impact of the respective constitutional framework on the common law, this part focuses largely on tort law and its theory. The fact that a new tort has formed part of the common law in New Zealand signifies an important recent development. The preoccupation with privacy and its reconciliation with conflicting interests in current scholarly literature are understandable and important. However, one should not lose sight of the fact that torts can be conceptualised quite differently. Different conceptions of tort law, as will be suggested, have implications for the comparability of individual cases. Hence, the recognition of a new tort also provides an opportunity to reconsider basic features of determining tort liability. In this respect, two main approaches will be distinguished. On the one hand, a tort regime may focus on remedies without an underlying right such as a common law right to privacy. In this scenario, the plaintiff is vested with a right to take action. It is, then, of primary importance whether a duty is to be imposed on the defendant. Given that the action has been made out, a right to compensation is conferred. By and large, this can be regarded as the prevalent approach. The 1990s have nevertheless seen a revived interest in tort theory. We will see that some theorists base their basic conceptions on the dichotomy of right and correlative obligation. In this case, the invasion of an individual right constitutes a civil wrong, which gives rise to a particular cause of action. This approach is favoured in this thesis. The micro-analysis will therefore provide an overview on how the application of different tort regimes may influence the protection of relevant privacy interests. Ultimately, I will attempt to align the constitutional dimension of the conflict with the common law sphere. In this respect, tentative suggestions will be made to the effect that a particular understanding of constitutional norms and their limitation (macro-level) accords with a particular understanding of conceptualising tort law (micro-level).

Secondly, a brief account of the author's understanding of the somewhat murky privacy interest must be provided. Apart from a necessary overview of this interest and its conception, a detailed discussion of privacy is not provided. The context of constitutional and tort law rather provides an analytically informed overview on how the rele-

vant aspect of privacy could be protected in law without unduly impinging on counter-vailing interests. However, I seek to demonstrate that privacy interests (despite numerous claims to the contrary) arguably cannot be confined to a single overarching definition. Instead, I will argue that different concepts of privacy work best in different contexts. In other words, the question concerned with the appropriateness of a particular privacy concept cannot be examined in isolation. Instead, tort law and its theory should inform the identification of the appropriate concept. In this respect, an ‘intrusion tort’ is most likely to occur as a distinct common law rule in addition to a tort protecting against the dissemination of personal information. Although both actions are frequently related, I seek to show that they should be distinguished from the very beginning. The query about the appropriate concept for present purposes may therefore be confined to the distinction between both torts. I will argue that ‘intrusion’ and ‘dissemination’ represent two distinct tortious ‘wrongs.’ The disclosure tort regulates the communication of personal information to others while an optional intrusion tort is concerned with physical behaviour (such as eavesdropping etcetera). Therefore, each ‘wrong’ requires distinguishable forms of conduct by the defendant. As causes of action, they ideally may be traced to the infringement of a common law right to privacy. However, both privacy based causes of action should only protect a particular aspect of the right to privacy and not privacy as a whole. As a result, I will suggest the application of a concept dovetailed for the purposes of the newly adopted tort, viz, a suitable concept for the unwarranted dissemination of personal information. This concept of privacy should be based on ‘control’ over personal information.

Lastly, the purpose of this thesis needs to be addressed. The fact that the comparative method is not restricted to descriptive elements, but also includes dogmatic aspects, implies that the thesis is aimed at a result. Thus, a suggestion for an ideal tort for New Zealand will be provided.¹⁹ In this respect, I should like to call the reader’s attention to my personal role. The present writer is a German civil lawyer and thus not from one of the countries involved in this analysis. The cultural background is certainly very important in the privacy context. Moreover, as a civil lawyer I am not versed in matters

¹⁹ Note that no suggestions with regard to available remedies are made. This analysis will also neglect the relationship between the privacy tort and, for example, the tort of defamation.

concerning the common law. The lack of intimate knowledge may call the usefulness of the following discussion into question. Nevertheless, humble contributions can be made inasmuch as unimpeded first impressions on most of the legal issues will be presented. My role, and one for which I am entirely qualified, is that of an ignoramus or outside observer. This is not to say, however, that I do not have prior expectations as regards privacy torts. As a German jurist, I am used to an equal protection of both privacy and freedom of speech, which means that no automatic preference is given to one of the interests. In brief, this writer is neither for privacy nor against freedom of speech, but tends towards a meaningful protection of both interests impinging no more than necessary on either of them. As for American law, it is widely known that the First Amendment has submerged other important values.²⁰ Since German law is of minor or no importance in the following, I gravitate towards a position that protects privacy and freedom of speech justly. Among the jurisdictions involved in this analysis, the law of the UK represents this position. English law, as will be suggested, is indeed in many ways the answer to the problems involved. I hope to demonstrate that objectively ascertainable arguments support this view. Although the approach taken in the UK is ultimately favoured here, its law will enjoy the least coherent attention. In lieu of an isolated analysis, it will be dealt with largely during the discussion of the torts of New Zealand and the USA. The broad scope of this thesis makes it generally difficult (and perhaps not even desirable), to distinguish the discussion of the legal systems strictly. Instead, the jurisdictions are sometimes also compared ‘on the spot,’ that is, where it is relevant.

This analysis nevertheless focuses on the relevant law of New Zealand. John Burrows has observed that the new tort raises the familiar question whether the common law or statute is most appropriate for a new development.²¹ I will attempt to carve out a preference for a third way, which I will refer to as a ‘constitutionalised common law tort.’ The New Zealand Court of Appeal’s decision in *Hosking*, as will be suggested, effectively contains two versions of an invasion of privacy tort. On the one hand, there exists a version emulating largely the American approach, and, on the other,

²⁰ *Hosking* [2005] 1 NZLR 1 (CA) para 74 per Gault P and Blanchard J.

²¹ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 409. See U J Cheer, ‘The Future of Privacy – Recent Legal Developments in New Zealand’ (2007) 13 *Canterbury Law Review* 169, 200 for additional possibilities the Law Commission might identify.

an alternative exposition that resembles British law. I conclude that the current approach taken in the UK is preferable. This approach is both compatible with the overarching human rights instrument and can be interpreted as incorporating a competitive conception of torts, that is, a mixed conception of corrective justice based on rights. In order to adapt such a model in New Zealand, the only necessary, and indeed desirable, legislative action should be confined to incorporating a right to privacy in the NZBoRA. The horizontal application of the rights to privacy and freedom of speech will in turn provide an analytical framework, which is necessary for a formal yet useful reconciliation of both conflicting interests.

In Chapter Two, I analyse the American law and conclude that the USA lacks the systematic capability necessary to protect the individual from the public dissemination of private information. The constitutional side of the analysis will show that the First Amendment is predominantly of systemic importance, which effectively renders any form of limiting the free flow of truthful information impossible. Interests in liberty, as will be suggested, are detached from individual responsibility. The subsequent analysis of the common law tort will display a similar result. The cause of action follows an instrumentalist conception of torts; it is comprised of strict liability rules aiming at a high level of predictability. The individualistic liberty interests of the defendant are emphasised to the detriment of interests in privacy. The elements of the tort will be analysed and, insofar as relevant, contrasted predominantly with English law. Generally, a tort regime based on strict liability rules will be compared to the preferred solution based on rights. In terms of substance and structure, the analysis shows that a constitutionalised tort presents nothing completely new to common lawyers. I seek to illustrate that the ‘substance’ of such a tort could be explained with reference to Lord Atkin’s ‘neighbour’ principle.²² The ‘structure’ of the tort, in contrast, would be akin to Lord Wilberforce’s two-step approach to negligence law as espoused in *Anns v Merton LBC*²³. As for the American law, I finally conclude that the horizontally applied First Amendment has practically ‘swallowed’ the private facts tort.

²² *Donoghue v Stevenson* [1932] AC 562, 580.

²³ [1978] AC 728, 741.

In Chapter Three, the quasi-constitutional framework in the context of English law (as provided by HRA and ECHR) will be discussed. Here I attempt to establish that the courts have given a strong indirect effect to relevant quasi-constitutional rights. A separate analysis in this respect is necessary, because the horizontally applied rights provide the formal framework functioning as a substitute for legislation. Because the ultimate aim is a ‘constitutionalised common law tort,’ it is necessary to rebut arguments to the effect that the common law has been relegated by giving horizontal effect to human rights norms. Instead, I seek to show that the incremental method of developing the common law gives way to an approach based on principles. The common law, as will be suggested, nevertheless remains an autonomous source of law.

Chapter Four starts with a discussion of New Zealand’s quasi-constitutional framework. As regards the interpretation of the NZBoRA, I argue that problems relevant for a horizontal application of the Act have not been solved yet. Furthermore, I seek to demonstrate the striking similarities of the NZBoRA and the HRA/ECHR. As for the analysis of the common law action, I attempt to show that only the alternative version of the tort following the British lead is consistent with the NZBoRA. An important aspect of this part of the analysis will be to show the inappropriateness of the highly offensive to a reasonable person test. I seek to show that this test could be replaced by means of employing a proportionality balancing exercise. In Chapter Five, the results are drawn together and a suggestion for an ideal ‘constitutionalised common law tort of privacy’ is made.

CHAPTER TWO - THE LAW OF THE USA

The recognition of privacy interests in the common law has its origin in the USA. The famous article ‘The Right to Privacy’²⁴ by Samuel Warren and Louis Brandeis initially triggered off this development. The article did not of course invent privacy more than a century ago, but identified it eloquently as a societal concern.²⁵ As for common law systems, the USA therefore has a long history in protecting this interest.²⁶ The development finally led to the recognition of constitutional interests related to privacy, and the protection of privacy aspects by statute in some states, as well as to the recognition of causes of action within the common law.²⁷ With regard to the latter, a second article, ‘Privacy’ by William Prosser,²⁸ was of seminal importance. In it, Prosser distilled a tort composed of four branches, one of which granted protection against the public disclosure of private information.

Unfortunately, this is also the most controversial branch and still one of the most fascinating puzzles of US tort law.²⁹ Consequently, both the courts and the legal teaching profession have devoted a vast amount of effort in order to defend or criticise the acceptance of the tort.³⁰ The bone of contention is almost always its uneasy relationship with interests in free speech.³¹

²⁴ (1890) 4 *Harvard Law Review* 193.

²⁵ G E White, *Tort law in America: An Intellectual History* (expanded ed, 2003) 173; L E Rothenberg, ‘Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space’ (2000) 49 *American University Law Review* 1127, 1133. See R P Bezanson, ‘The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990’ (1992) 80 *California Law Review* 1133 for a more detailed discussion of the historical background.

²⁶ The French ‘Loi Relative a la Presse’, 11 May 1868 is, for instance, older – see S D Warren and L D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193, 214; L Brazell, ‘Confidence, Privacy and Human Rights: English Law in the Twentieth Century’ (2005) 27 *European Intellectual Property Review* 405, 406.

²⁷ See E Tison, ‘Straddling the Fence: Justice Breyer's concurrence in *Bartnicki v Vopper* gives Protection of Privacy and still Manages to Protect the Press: *Bartnicki v Vopper*, 532 US 514 (2001)’ (2003) 27 *Southern Illinois University Law Journal* 661, 665.

²⁸ W L Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383.

²⁹ D J Solove, ‘The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure’ (2003) 53 *Duke Law Journal* 967, 970-71; see also J R Rolfs, ‘The Florida Star v BJJ: The Beginning of the End for the Tort of Public Disclosure’ [1990] *Wisconsin Law Review* 1107, 1108.

³⁰ See also A J McClurg, ‘Kiss and Tell: Protecting Intimate Relationship Privacy through Implied Con-

As we will later see during the discussion of New Zealand's law, many of the problems, which occurred in this country at an early stage of the tort's development, were already well known in the USA. The following discussion should predominantly serve as a basis to deal properly with the question whether the influential experience³² gained in the USA should or even could be transferred into the New Zealand legal system. As I seek to demonstrate, the reason why US jurisdictions are struggling to reconcile privacy interests and free speech for more than a century stems not only from the vagueness of the concept of privacy.³³ It is rather the inability to protect both interests (for example, by means of balancing competing interests) and the interpretation of the First Amendment contribute at least equally to these difficulties. Not without irony, the importance of freedom of speech to legal and political culture in the USA is often stressed; however, very little has been written on the line between the freedom of speech protected by the First Amendment and that which is not protected.³⁴ Effectively, I will suggest, the right to freedom of speech is treated as an 'absolute,' which is why a great deal of the dispute entwining itself around the tort could be reduced to two irreconcilable positions: balancers and absolutists. In the following, we will follow the suggested method and distinguish between the constitutional framework (macro-level) and the public dissemination tort itself (micro-level of the analysis).

tracts of Confidentiality' (2006) 74 *University of Cincinnati Law Review* 887, 896, who observes that the tort has a 'distinguished academic pedigree.'

³¹ See, eg, D M Worley, 'Shulman v Group W Productions: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity' (1999-2000) 27 *Western State University Law Review* 535, 538; D A Richards, 'Public and Private in the Discourse of the First Amendment' (2000) 12 *Cardozo Studies in Law and Literature* 61, 88; J B Mintz, 'The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain' (1996) 55 *Maryland Law Review* 425, 448; M Schadrack, 'Privacy and the Press: A Necessary Tension' (1985) 18 *Loyola of Los Angeles Law Review* 949, 950; J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 246; J R Rolfs, 'The Florida Star v BJJ: The Beginning of the End for the Tort of Public Disclosure' [1990] *Wisconsin Law Review* 1107, 1109.

³² Eg, *Hosking* [2005] 1 NZLR 1 para 210 per Keith J.

³³ The main difficulty in this area is to distinguish 'private' from 'public facts' - R A Smolla, 'Accounting for the Slow Growth of American Privacy Law' (2002) 27 *Nova Law Review* 289, 296.

³⁴ N M Richards, 'Reconciling Data Privacy and the First Amendment' (2005) 52 *UCLA Law Review* 1149, 1169-70.

1 Constitutional background of the speech-privacy conflict

Privacy, as distinct from freedom of speech, is not explicitly protected by any of the Amendments to the US Constitution.³⁵ While illuminating the viability of privacy upon constitutional provisions, a difference has to be made between the acknowledgement of privacy as an interest of constitutional stature (protecting against governmental interference)³⁶ on the one hand and the constitutional viability of a particular ‘right’ offering protection against public disclosure of private, albeit truthful, facts on the other. The acknowledgement of the latter interest causes problems, because it would establish tort liability for the publication of truthful information and thereby directly conflicts with First Amendment interests. Hence, the general debate about the US privacy tort does not seem to focus on whether or not such an interest should be recognised by law (and what form this protection should take). It rather centres on its theoretical compatibility with the current free speech doctrine. The tort’s viability is therefore inextricably entangled with the comprehension of the protection granted by the First Amendment, which will be illuminated in the following.

1.1 Foundations of a constitutional ‘right to privacy’

Despite some legal dispute, privacy, charitably understood, was finally recognised as a fundamental interest protected by the US Constitution. Although not directly relevant to the public disclosure tort, a brief discussion nevertheless seems advantageous particularly with regard to the acknowledgement of the corresponding common law action in New Zealand. As detailed below, the NZBoRA does not recognise a general right to privacy either, which is arguably why this country witnessed a very similar discussion on this point in *Hosking*.

³⁵ *Griswold v Connecticut*, 381 US 479, 508 per Black J (dissenting).

³⁶ Note that these privacy interests are more appropriately addressed as interests in individual autonomy.

The essential case³⁷ in this context is *Griswold v. Connecticut*³⁸ in which the majority of the US Supreme Court advocated protecting a right of privacy in order to strike down a law prohibiting the use of contraceptives by married persons.³⁹ Justice Goldberg, writing for the Court, identified penumbras ‘formed by emanations’ amidst the specific guarantees of the Bill of Rights, which ‘help and give them substance.’⁴⁰ The purpose of the 14th Amendment and the history of the Ninth Amendment supported the recognition of such a right.⁴¹ Particularly the Ninth Amendment was said to imply the recognition of unenumerated rights existing without being expressly mentioned.⁴² The Ninth Amendment reads:

The enumeration in the Constitution, of certain rights, will not be construed to deny or disparage others retained by the people.

The right to (marital) privacy was deemed older than the Bill of Rights and older than the political parties.⁴³ The majority’s opinion can hence be summarised as saying that several enumerated rights⁴⁴ ‘create[d] zones of privacy’,⁴⁵ all of which established a general constitutional right protected under the Ninth Amendment.

Justice Goldberg, thus, found a constitutional basis for a right of privacy although an explicit basis within the Bill of Rights was not necessary. Instead, he pointed out that the Ninth Amendment gave textual recognition of the fact that there were other

³⁷ E J Eberle, ‘Human Dignity, Privacy, and Personality in German and American Constitutional Law’ [1997] *Utah Law Review* 963 fn 574. As a result of this case several states included ‘a specific clause protecting privacy in their state constitutions’ - A Ku, ‘Talk is Cheap, but a Picture is Worth a Thousand Words: Privacy Rights in the Era of Camera Phone Technology’ (2005) 45 *Santa Clara Law Review* 679, 690.

³⁸ *Griswold v Connecticut*, 381 US 479, 486 (1965).

³⁹ The US Supreme Court provided beforehand, for instance, for the right of parents to educate their children in religious or private schools in *Pierce v Society of Sisters*, 268 US 510 (1925); additionally, this authority granted the right to procreate by precluding governments the relation of convicted criminals on the commission of any felony in *Skinner v Oklahoma*, 316 US 535 (1942).

⁴⁰ *Griswold v Connecticut*, 381 US 479, 484, 487 (1965).

⁴¹ *Ibid*, at p 488.

⁴² *Ibid*, at p 492.

⁴³ *Ibid*, at p 486.

⁴⁴ The Court mentioned the First Amendment right to association; the Third Amendment; the Fourth Amendment concerned with search and seizure and the Self Incrimination Clause of the Fifth Amendment – *ibid*, at p 484.

⁴⁵ *Ibid*, at p 484.

values of equal importance to the specific provisions to the Bill of Rights.⁴⁶ According to the learned Judge, the Ninth Amendment showed a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments; this reasoning implies an intention that the list of rights is not to be deemed exhaustive.⁴⁷ As detailed below, this line of argument resembles Tipping J's reasoning on the recognition of the privacy interest in *Hosking*. In the author's view, one can take advantage of the Supreme Court's reasoning in order to subsume the recognition of privacy interests under s 28 NZBoRA.

The historical background of the Ninth Amendment was an argument concerning the question as to whether a bill of rights was necessary at all. The group answering this question in the negative argued that it would be impossible to list all existing rights. In their opinion, it would have been dangerous to enshrine even some of them. The opposing group feared that there would be those who would cease on the absence of the omitted rights to assert that government was unrestrained as to those.⁴⁸ The incorporation of the Ninth Amendment was the response to those concerns.⁴⁹

Harlan J, in contrast, recognised a 'right to privacy' based on natural law.⁵⁰ The Judge focused on whether the statute violated basic values 'implicit in the concept of ordered liberty.'⁵¹ In doing so, he was moving perfectly within the tradition of the

⁴⁶ This approach has been described as the 'most cogent' explanation for a constitutional right to privacy - W J Chriss, 'Personhood and the Right to Privacy in Texas' (2007) 48 *South Texas Law Review* 575, 595.

⁴⁷ *Griswold v Connecticut*, 381 US 479, 492; see also S Breyer, 'Our Constitutional Democracy' (2002) 77 *New York University Law Review* 245, 269-70 who argues that the Ninth Amendment was added 'to make clear that 'rights, like law itself, should never be fixed, frozen, that new dangers and needs will emerge, and that to respond to these dangers and needs, rights must be newly specified to protect the individual's integrity and inherent dignity' (internal citation omitted).

⁴⁸ The Federalist No 84, <<http://www.constitution.org/fed/federa84.htm>> 03 March 2008.

⁴⁹ According to 1 Annals of Congress 439 (1789) as cited in *Griswold v Connecticut*, 381 US 479, 489-90 James Madison said: 'It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights, which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of the bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.'

⁵⁰ *Griswold v Connecticut*, 381 US 479, 511 per Black J (dissenting).

⁵¹ *Ibid*, p 500 (internal citations omitted). A similar point was made by Justice White (concurring) – at p 502.

Court. According to Nowak, the Court has always actively enforced values, which a majority of the Justices felt were essential to American society. The fact that they had no specific textual basis in the Constitution was of minor importance.⁵² With this approach, Supreme Court judges selected and protected certain liberties under the Due Process Clause (the 14th Amendment).⁵³

However, Justice Black, joined by Justice Stewart, dissented in *Griswold* and objected to the recognition of a general privacy interest. The main reason for his opposition was an inability to find a clear textual basis for this right in the Bill of Rights.⁵⁴ In his view, particularly the Fourth Amendment protecting against unreasonable searches and seizures was only an example demonstrating that guarantees in certain constitutional provisions were designed *in part* to protect privacy in *certain times* and *places* with respect to *certain activities*.⁵⁵ According to Black J, the majority of the Court was ‘exalting a phrase which Warren and Brandeis used in discussing grounds for *tort relief*, to the level of a *constitutional rule*.’⁵⁶ Absent any explicit recognition, it was for the legislator to decide whether an aspect of privacy was worthy of protection.⁵⁷ This line of argument, in its juridical substance, resembles particularly Keith J’s reasoning in *Hosking*.⁵⁸

Later in *Roe v Wade*,⁵⁹ the US Supreme Court held that a constitutional right to privacy protects a woman’s control over her body in terms of terminating a pregnancy. The Court made a brief reference to the Ninth Amendment but based its holding on the concept of liberty protected by the 14th Amendment.⁶⁰ In each of the mentioned cases a general right of privacy was seemingly granted apart from the particular facts of the case. Nevertheless, it is still questionable as to whether the Court was protecting specifically a right of access to contraceptives, a right to inter-racial marriages or a right to

⁵² J E Nowak, *Constitutional Law* (5th ed, 1995) 399, see also *Griswold v Connecticut*, US 479, 487 fn 1 (1965).

⁵³ *Ibid*.

⁵⁴ *Griswold v Connecticut*, 381 US 479, 508-9 (1965); see also at p 530.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*, at p 510 fn 1.

⁵⁷ See *ibid*, at p 512.

⁵⁸ [2005] 1 NZLR 1 (CA) paras 185-207.

⁵⁹ 410 US 113 (1973).

⁶⁰ *Ibid*, at p 153.

have an abortion as such, or whether it was developing a principle of individual autonomy.⁶¹ Justice Marshall later summarised the implications of *Roe v Wade* and its progeny as saying that these cases were not so much about medical procedures, but about the woman's fundamental right to self determination and the freedom from government domination in making the most intimate and personal decisions.⁶² This seems to be an isolated view however. In the following decades, the Supreme Court several times had to decide about the scope of the constitutional 'right to privacy.'⁶³ These decisions did not reverse the initial step of recognising this interest; they rather shaped its extent in a slightly inconsistent manner.⁶⁴ It is fair to say that the US constitutional law is generally 'episodic' rather than 'systematic;' this system therefore closely resembles common law methodology, which might explain its attractiveness for some jurists in New Zealand and the UK.⁶⁵

1.2 First Amendment viability of the public disclosure of private facts

As we have seen, the majority of the American Supreme Court stood quite ready to recognise a constitutional interest in privacy or rather personal autonomy protecting against governmental intrusion. The protection is less definite with regard to the problem as to whether this interest entails protection against public disclosure of truthful private information.⁶⁶ Prosser opined that the constitutional 'right to privacy' embraces the privacy interests protected by the common law.⁶⁷ However, a newer trend rather

⁶¹ See D Vetri, *Tort law and practice* (1998) 984-5.

⁶² Ibid, at p 985. These decisions therefore seem to be better subsumed under the headline 'autonomy' rather than 'privacy' - J Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 *Seton Hall Law Review* 371, 385. Another approach to the same effect distinguishes 'informational privacy' from 'decisional privacy' - N M Richards, 'The Information Privacy Law Project' (2006) 94 *Georgetown Law Journal* 1087, 1105.

⁶³ Eg, *Bowers v Hardwick*, 478 US 186 (1986).

⁶⁴ See E J Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' [1997] *Utah Law Review* 963, 991; see also A J Rappaport, 'Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy' [2001] *Utah Law Review* 441, 448 ('One might be skeptical, especially if the Court's jurisprudence is defined with any degree of specificity. The Supreme Court, after all, does not appear to be guided by an overarching set of normative principles' – internal citations omitted).

⁶⁵ See E J Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' [1997] *Utah Law Review* 963, 992.

⁶⁶ It is still not clear, 'to what extent the constitutional right of privacy overlaps the tort right of privacy' - M Schadrack, 'Privacy and the Press: A Necessary Tension' (1985) 18 *Loyola of Los Angeles Law Review* 949, 954; D J Solove, 'The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure' (2003) 53 *Duke Law Journal* 967, 994 (2003).

⁶⁷ W P Keeton (ed), *Prosser and Keeton on Torts* (5th ed, 1984) 866; to the same effect see also J Wagner

seems to distinguish between privacy protected as constitutional liberty and a private ‘right of privacy’ grounded in tort.⁶⁸ Both interests are analytically different.⁶⁹ Notwithstanding, the ‘episodic’ aspect of privacy we have to deal with here is particularly problematic. It should be kept in mind that this branch of the tort is concerned with truthful information, which may be regarded as lying at the heart of First Amendment protection. Furthermore, the tort represents a content-based interference with speech,⁷⁰ which requires the strictest standards of constitutional review in the USA.⁷¹ As a rule of thumb, information of this kind is unlikely to be upheld as commensurate with First Amendment standards.⁷² ‘Content-based’ speech restriction has to be distinguished from ‘content-neutral’ speech control, which has to satisfy a lower degree of scrutiny. An example for a ‘content neutral’ speech control would be a law even-handedly restricting the dissemination of information obtained through ‘eavesdropping’ regardless of its nature or contents. Thus, the constitutional viability of the public dissemination tort will be analysed next. This analysis will carve out (1) the primary function of the First Amendment, (2) why it influences especially the ‘public interest’ element of the public disclosure tort, and (3) what the implications of this influence are.

1.2.1 Function and doctrinal framework of the First Amendment

The use of the term speech-privacy ‘conflict’ already indicates the necessity to clarify why the First Amendment standard is so strict and, hence, requires identifying the concept or primary function of free speech in that country. If it were otherwise, one

De Cew, ‘The Scope of Privacy in Law and Ethics’ (1986) 5 *Law and Philosophy* 145, 173.

⁶⁸ J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ (1996) 55 *Maryland Law Review* 425, 442; *Richard v Wal-Mart Stores Inc.*, (2007) Westlaw 1521467 at p 5.

⁶⁹ J R Rolfs, ‘The Florida Star v BIF: The Beginning of the End for the Tort of Public Disclosure’ [1990] *Wisconsin Law Review* 1107, 1108. See too R Gavison, ‘Too Early for a Requiem: Warren and Brandeis were Right on Privacy v Free Speech’ (1992) 43 *South Carolina Law Review* 437, 447, who argues that both interests have ‘no connection whatsoever.’

⁷⁰ D J Solove, ‘The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure’ (2003) 53 *Duke Law Journal* 967, 984; J Lenow, ‘First Amendment Protection for the Publication of Private Information’ (2007) 60 *Vanderbilt Law Review* 235, 247.

⁷¹ See *Police Department of the City of Chicago v Mosley*, 92 S Ct 2286, 2290 (1972) – the Court argued that ‘the essence of forbidden censorship is content control’; state actors are thus not allowed to ‘restrict expression because of its message, its ideas and its content’; see also *New York Times v Sullivan*, 376 US 254, 270 (1964). A restriction is merely valid if it is ‘necessary to serve a compelling state interest and [...] narrowly drawn to achieve that end’ - *Perry Educators Association v Perry Local Educators’ Association*, 460 US 37, 45 (1983).

⁷² *Daily Mail Pub Co v Smith*, 443 US 97, 102 (1979); E Volokh, ‘Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You’ (2000) 52 *Stanford Law Review* 1049, 1089.

would not know, if at all, on which occasion a privacy interest actually could or has to prevail. In brief, any solution to the conflict would be difficult.⁷³ As long as the courts are reluctant to determine what kind of speech is at stake in a particular case, an elaborate concept of privacy will arguably never be developed. Privacy rather clashes with a monolithic protection of speech interests and loses.⁷⁴

The Supreme Court has unfortunately not fostered a single rationale underlying First Amendment speech.⁷⁵ Instead, there are a large number of doctrines championed by single judges as opposed to a single doctrine applied by the Court.⁷⁶ For the purposes of this analysis, it is nevertheless fair to identify the Court's prevalent emphasis on the *systemic* value of speech; this in turn requires the courts to maintain content neutrality as far as possible.⁷⁷ An emphasis on the systemic importance focuses on the needs of the *audience* whereas the rights based approach concentrates on the autonomy of the *speaker*.⁷⁸ The systemic approach is best encapsulated by the 'marketplace of ideas' metaphor, which was first circumscribed by John Milton and John Stuart Mill.⁷⁹

⁷³ See also C Hart, 'Y.G. v Jewish Hospital of St. Louis: Breathing Life into the "Disclosure of Private Facts" Tort' (1991) 35 *Saint Louis University Law Journal* 931, 939.

⁷⁴ Freedom of speech and freedom of the press are equated during this analysis. The press is therefore regarded as a distinct constitutional speaker and not as an institution – see R P Bezanson, 'The Developing Law of Editorial Judgment' (1999) 78 *Nebraska Law Review* 754, 759.

⁷⁵ V Mayer-Schonberger and T E Foster, 'More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law' (1995) 18 *Boston College International and Comparative Law Review* 59, 65-6.

⁷⁶ E Kagan, 'Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine' (1996) 63 *University of Chicago Law Review* 413; C E Wells, 'Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence' (1997) 32 *Harvard Civil Rights-Civil Liberties Law Review* 159, 171 fn 47 citing R C Post, 'Racist Speech, Democracy, and the First Amendment' [1991] *William and Mary Law Review* 267, 278, who notes that 'first amendment doctrine [...] is a vast Sargasso Sea of drifting and entangling values, theories, rules, exceptions, predilections').

⁷⁷ J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 240; see also V Mayer-Schonberger, T E Foster, 'More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law' (1995) 18 *Boston College International and Comparative Law Review* 59, 61-2; C E Wells, 'Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence' (1997) 32 *Harvard Civil Rights-Civil Liberties Law Review* 159, 162 for a discussion of different scholarly interpretations of the different reasons for the Court's hostility towards contents-based speech restrictions; S Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' [1984] *Duke Law Journal* 1, 43.

⁷⁸ E Kagan, 'Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine' (1996) 63 *University of Chicago Law Review* 413, 413; see also R Wacks, 'Why there will never be an English common law privacy tort' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 154, 169.

⁷⁹ V Mayer-Schonberger, T E Foster, 'More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law' (1995) 18 *Boston College International and Compara-*

Oliver Wendell Holmes coined the actual phrase however.⁸⁰ Holmes will be a pivotal figure in the following due to his contributions to both First Amendment doctrine and tort theory. His predominant influence on the development of both the common law and First Amendment jurisprudence has been described as ‘positivistic’ due to a strict separation of ‘law’ and ‘morality.’⁸¹ However, it is rather apposite to suggest that Holmes was clearly influenced by early utilitarian thinkers, but his legal theory is more accurately addressed as ‘legal realism’ or ‘pragmatic instrumentalism.’⁸² According to Summers, pragmatism is the ‘only indigenous theory of law’ ever developed in the USA;⁸³ legal positivism is just one tenet of it. It is nevertheless difficult to put Holmes in any pigeonhole – both as a person and jurist. His peers have lauded Holmes as ‘the great overlord of the law and its philosophy’⁸⁴ while other compatriot detractors likened him to Adolf Hitler.⁸⁵ The complexity of his personality was perhaps best captured in Catharine Wells’ book review title ‘The Hidden, Inner Life of a Cynical, Ambitious, Detached, and Fascistic Old Judge without Values.’⁸⁶

Be that as it may, to this writer at least Holmes’ marketplace of ideas has been adequately described as amounting to a crude appeal to ‘the amoral deliverances of So-

tive Law Review 59, 64; see also P Lahav, ‘Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech’ (1988) 4 *Journal of Law and Politics* 451, 455; S Ingber, ‘The Marketplace of Ideas: A Legitimizing Myth’ [1984] *Duke Law Journal* 1, 3; D A Logan, ‘Tort Law and the Central Meaning of the First Amendment’ (1990) 51 *University of Pittsburgh Law Review* 493, 540.

⁸⁰ *Abrams v United States* 250 US 616, 630 (1919) - Holmes famously argued, ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market,’ for a recent case emphasizing the theory see *Virginia v Black*, 538 US 343, 358 (2003).

⁸¹ T A Reed, ‘Holmes and the Paths of the Law’ (1993) 37 *American Journal of Legal History* 273, 279; see also J Knudson, ‘The Influence of the German Concepts of Volksgeist and Zeitgeist on the Thought and Jurisprudence of Oliver Wendell Holmes’ (2002) 11 *Journal of Transnational Law and Policy* 407, 415-6; R M Dworkin, ‘Hart’s Postscript and the Character of Political Philosophy’ (2004) 24 *Oxford Journal of Legal Studies* 1, 33.

⁸² R S Summers, ‘On Identifying and Reconstructing a General Legal Theory – Some Thoughts Prompted by Professor Moore’s Critique’ (1984) 69 *Cornell Law Review* 1014, 1014-20.

⁸³ R S Summers, ‘Pragmatic Instrumentalism in Twentieth Century Legal Thought – A Synthesis and Critique of our Dominant Legal Theory about the Law and its Use’ (1980-81) 66 *Cornell Law Review* 861, 862.

⁸⁴ J Knudson, ‘The Influence of the German Concepts of Volksgeist and Zeitgeist on the Thought and Jurisprudence of Oliver Wendell Holmes’ (2002) 11 *Journal of Transnational Law and Policy* 407, 413 (2002) (internal citation omitted).

⁸⁵ T A Reed, ‘Holmes and the Paths of the Law’ (1993) 37 *American Journal of Legal History* 273, 279.

⁸⁶ C P Wells, ‘Reinventing Holmes: The Hidden, Inner, Life of a Cynical, Detached, Ambitious and Fascistic old Judge without Values’ (2002) 37 *Tulsa Law Review* 801 review of A Alschuler, *Law Without Values: The Life, Work and Legacy of Mr Justice Holmes* (internal citations omitted). Wells does not share this critical view of Holmes.

cial Darwinian competition.⁸⁷ Later on, we will see that his tort theory is based on foresight and predictability measured on ‘common experience’ (and thus external legal standards) as opposed to individual experience.⁸⁸ This will prove illuminating, because mainstream US tort theory has remained deeply Holmesian.⁸⁹ The inherent foregone conclusion with regard to reconciling a privacy interest (considered as purely individual in this intellectual context) with a societal (and thus systemic) interest in free speech will be examined below. Furthermore, Holmes is frequently quoted as saying that ‘the life of the law has not been logic: it has been experience.’⁹⁰ This statement seems to some extent representative for the common law. I should nevertheless point out that the law does certainly not follow mathematical logic, but where appropriate logic will be used in the following if it helps solve a problem easily.⁹¹

However, two general points will be made because they may have influenced Holmes’ view on the purpose of both freedom of speech *and* common law: (1) Holmes had apparently nothing but scorn for Kant’s moral philosophy and its central dictum that human beings should be treated as an end in themselves and never as means to an end;⁹² and (2) according to Grant Gilmore ‘Holmes was savage, harsh, cruel, a bitter

⁸⁷ D A Richards, ‘Public and Private in the Discourse of the First Amendment’ (2000) 12 *Cardozo Studies in Law and Literature* 61 (emphasis added). Holmes work is indeed deeply rooted in Social Darwinism – J Knudson, ‘The Influence of the German Concepts of Volksgeist and Zeitgeist on the Thought and Jurisprudence of Oliver Wendell Holmes’ (2002) 11 *Journal of Transnational Law and Policy* 407, 413; and N Duxbury, *Patterns of American Jurisprudence* (1995) 43–6 on the influence of Darwinism on Holmes.

⁸⁸ H Hovenkamp, ‘The Marginalist Revolution in Legal Thought’ (1993) 46 *Vanderbilt Law Review* 305, 336; see also J C Goldberg and B C Zipursky, ‘The Moral of MacPherson’ (1998) 146 *University of Pennsylvania Law Review* 1733, 1738; D M Rabban, ‘The Emergence of Modern First Amendment Doctrine’ (1983) 50 *University of Chicago Law Review* 1205, 1267.

⁸⁹ J C Goldberg and B C Zipursky, ‘The Moral of MacPherson’ (1998) 146 *University of Pennsylvania Law Review* 1733, 1738; see too their ‘Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties’ (2006) 75 *Fordham Law Review* 1563, 1570.

⁹⁰ V Blasi, ‘Holmes and the Marketplace of Ideas’ [2004] *Supreme Court Review* 1, 2-3 (internal citation omitted); for a brief discussion on the development of this view see Note ‘Holmes: A Legend in Search of Demystification’ (1990) 103 *Harvard Law Review* 800, 801-3; see also N Duxbury, *Patterns of American Jurisprudence* (1995) 39, who suggests that Holmes subscribed to a legal philosophy far from being intolerant of logic.

⁹¹ See generally R Scragg, *New Zealand’s Legal System* (2005) 24; E W Thomas, *The Judicial Process* (2005) 187.

⁹² D M Rabban, ‘The Emergence of Modern First Amendment Doctrine’ (1983) 50 *University Chicago Law Review* 1205, 1268-9; T A Reed, ‘Holmes and the Paths of the Law’ (1993) 37 *American Journal of Legal History* 273, 294; see also C E Wells, ‘Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence’ (1997) 32 *Harvard Civil Rights-Civil Liberties Law Review* 159, 172 fn 52 (1997); S J Heyman, ‘Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression’ (1998) 78 *Boston University Law Review* 1275, 1299.

and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and the powerful impose their will on the poor and weak.⁹³ Justice Brandeis, for instance, championed both privacy and free speech and was apparently a judge of different character.⁹⁴ Suffice it to say at this point that even a cautious interpretation of both statements reveals a deeply rooted scepticism with regard to intrinsic worth and needs of the individual human being. This premise provides in turn a rather unfavourable intellectual climate for a meaningful protection of relevant privacy interests – particularly under the influence of modern human rights instruments in other countries. Thus, my intention is not to discredit Holmes. His work arguably provides indeed the perfect compliment to a business-run society.⁹⁵ However, it is advantageous to sharpen one's senses that he might also be a 'devil incarnate' rather than a magnificent curator for the protection of the relevant privacy interest.

1.2.2 Early implications for New Zealand and the UK

The intrinsic problems of a legal theory conveying an outspoken disregard of the individual human being become evident once contemporary US tort rules (and First Amendment doctrine) are rendered into a different legal environment – most notably in New Zealand where an almost identical common law tort was announced to be consistent with the NZBoRA. Consider, for instance, a significant statement from Anderson J's judgment in *Hosking*. His Honour did not acknowledge the tort and remarked:

'[f]reedom of expression is the first and the last trench in the protection of liberty. All of the rights affirmed in the NZBoRA are protected by that particular right.'⁹⁶

⁹³ V Blasi, 'Holmes and the Marketplace of Ideas' [2004] *Supreme Court Review* 1, 14 (internal citation omitted); see also P Lahav, 'Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech' (1988) 4 *Journal of Law and Politics* 451, 454, who observes that one's temperament influences the philosophical view; Lahav continues by pointing out, 'Holmes was basically a skeptic and a pessimist, Brandeis an optimist.'

⁹⁴ P Lahav, 'Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech' (1988) 4 *Journal of Law and Politics* 451, 469 ('Brandeis was born into a family that made progress and moral universalism a religion'); and at p 470 ('Above all, he had confidence in the individual, in each person's power to reform society and themselves'); D M Rabban, 'The Emergence of Modern First Amendment Doctrine' (1983) 50 *University of Chicago Law Review* 1205, 1321 ('Unlike the aloof Holmes, detached from and often contemptuous of human efforts to change society, Brandeis became an activist who combined a genuine humanitarianism with a firm belief in individual dignity and autonomy').

⁹⁵ For examples see, eg, E Volokh, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking about You' (2000) 52 *Stanford Law Review* 1049, 1073.

⁹⁶ [2005] 1 NZLR 1 (CA) para 267 (emphasis added).

I perceive this statement as a platitude,⁹⁷ which is afflicted by the basic problem that there is not an iota of truth in the latter sentence. The first sentence paraphrases the systemic value of freedom of speech in the context of Political Liberalism as espoused, for instance, by Mill and in a simplistic manner by Holmes.⁹⁸ Viewed in isolation, this sentence is perfectly arguable given that modern human rights instruments such as the NZBoRA or HRA would not be applied to govern a legal dispute. According to Anderson J's following suggestion, however, all *rights* are shoehorned under the aegis of the *right* of freedom of speech since the advent of the NZBoRA. This writer respectfully disagrees with his Honour's last proposition.

For the time being, Anderson J's proposition will be contrasted with an alternative view of the Canadian Privacy Commissioner:⁹⁹

[o]ur fundamental rights and freedoms – of thought, belief, expression and association – depend in part upon a meaningful measure of privacy. Unless we retain the power to decide who should know our political allegiances, our sexual preferences, our confidences, our fears and aspirations then the very basis of a free and democratic society could be undermined.

This statement, I suggest, reflects the accurate approach to be taken - at least under the aegis of modern human rights instruments. The 'rights' are based on the concept of the autonomous, socially responsible individual with inherent dignity.¹⁰⁰ The need of privacy, in this context, may be seen as a manifestation of human dignity.¹⁰¹ In my view, both HRA and NZBoRA incorporate those ideals (sometimes associated with

⁹⁷ His Honour's statement is often used in order to emphasise the importance of free speech in contemporary legal debates. See, for instance, J Wilson, 'Media Law Symposium: Prior Restraint of the Press' [2006] *New Zealand Law Review* 551, 558; M Hickford, 'A Conceptual Approach to Privacy' NZLC MP19 para 91.

⁹⁸ Mill's theory proposes restrictions of harmful speech on a utilitarian basis. Mill was also alert of the 'tyranny of the majority' – a threat from 'coercive public opinion' which also includes a threat of mass media to individual opinion. But within Mill's framework, the distinction between 'persuasion' and 'coercion' is difficult to identify - J J Ofseyer 'Talking Liberty with John Stuart Mill' [1999] *Annual Survey of American Law* 395, 414.

⁹⁹ *Genetic Testing and Privacy* (Ottawa, 1995) 2 as cited by J F Burrows, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389.

¹⁰⁰ See also s 23(5) NZBoRA. See for the situation in the UK see G Moon and A Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality' (2006) 6 *European Human Rights Law Review* 610.

¹⁰¹ The majority got it right - see *Hosking* [2005] 1 NZLR 1 (CA) para 22 per Gault P and Blanchard J; paras 239 and 258 per Tipping J.

Kant) that Holmes so despised and Anderson J so ignores. Hence, I suggest that ‘privacy’ should be approached in a ‘bottom-up’ manner starting from human dignity.¹⁰² The US approach, in contrast, is ‘top-down’ guided by the protection of freedom of speech as a systemic value. Indeed, this leads to a clash of diametrically opposed systems if US tort rules and First Amendment doctrine are supposed to be consistent particularly with the implications of the NZBoRA.¹⁰³ To my mind, particularly some jurists in New Zealand play on the nomenclature of their human rights instrument, but subcutaneously handle privacy actions in a ‘top-down’ manner by emphasising the systemic value of freedom of speech. Anderson J is an apt example of this phenomenon.¹⁰⁴ In order to get the premise straight,¹⁰⁵ it is suggested that his Honour’s statement should be reformulated as follows:

Human dignity is the first and the last trench in the protection of individual liberty. All of the rights affirmed in the NZBoRA are protecting that particular concept.¹⁰⁶

¹⁰² Compare Richardson and Hitchens, who query whether ‘the current emphasis on privacy supports the conclusion that a shift has occurred towards a dignitary conception’ – M Richardson and L Hitchens, ‘Celebrity privacy and the benefits from simple history’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 250, 264.

¹⁰³ See also R Wacks, ‘Why there will never be an English common law privacy tort’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 154, 169-70 (Wacks describes a systemic interpretation of free speech and a rights based approach on privacy and mentions, ‘[p]roblems instantly loom’).

¹⁰⁴ See also J Q Whitman, ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (2004) 113 *Yale Law Journal* 1151. Distinguishing individuality from community generally seems to be difficult for some scholars in the USA but is crucial to understand the difference of the systems. See for the protection human dignity in Israel - I Englard, ‘Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework’ (2000) 21 *Cardozo Law Review* 1903 for further details.

¹⁰⁵ In my view, privacy follows from human dignity as embodied in modern human rights texts. Accordingly, a tort protecting this interest has to be fashioned in a ‘bottom up’ manner once HRA or NZBoRA have been held applicable to a private law dispute. By choosing the term ‘premise’, I presuppose that privacy is also a moral claim. Privacy must therefore follow from its underlying premises. The premise is important because ‘it would be self-contradictory for anyone to assert the premise and at the same time to deny the conclusion’ – see A J Rappaport, ‘Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy’ [2001] *Utah Law Review* 441, 451.

¹⁰⁶ The characterisation of human dignity as a ‘concept’ has been used deliberately as the lowest common denominator – see G Moon and A Allen ‘Dignity Discourse in Discrimination Law: A Better Route to Equality’ (2006) 6 *European Human Rights Law Review* 610, 615 for further details (the authors discuss human dignity as a concept, interest, value and right). See also *Brooker v Police* [2007] 3 NZLR 91 (SC) para 177 per Thomas J. This is also the basis of the International Covenant on Civil and Political Rights (ICCPR) as evidenced in its Preamble: ‘The States Parties to the present covenant [...] Recognizing that these rights derive from the inherent dignity of the human person [...] Realizing that the individual, having duties to other individuals and to community to which he belongs, is under a responsibility to strive

It may sound like a ‘verbal quibble,’ but it means something completely different. In more illustrative terms, history repeats itself and a Kantian approach with its focus on the individuals’ intrinsic worth has ‘another go’ on Holmesian common law once modern human rights instruments have been held applicable. Someone used to a system as implemented in the HRA and NZBoRA is indeed likely to be instantly repulsed by the doctrinal framework underlying the US privacy tort. However, this must always be seen in the light of the law’s cultural setting. It should be stressed that US law is generally committed to an individualistic ideology and has consequently uncoupled liberty from individual responsibility to a large extent.¹⁰⁷ We will see later that this primarily negative understanding of liberty is well attuned to a tort law regime, which also focuses on the liberty interests of defendants. Security interests of plaintiffs in their personal (private) information therefore do not feature prominently in this socio-political climate. Thus, it should already be indicated that certain forms of constitutionalism work smoothly together with certain understandings of tort law and its underlying theory. The uncompromising emphasis on liberty in US law, by contrast, may be the chief reason for a practically defunct privacy tort. However, we will now return to First Amendment issues.

1.2.3 Constitutionalisation of private law

Why is the interpretation of the First Amendment important for the common law tort in the first place? The Supreme Court held in *New York Times v Sullivan*, ‘the Constitution delimits a State’s power to award damages in libel actions brought by public officials against critics of their official conduct.’¹⁰⁸ The Fourteenth Amendment (the Due Process Clause) made the First Amendment applicable to the states.¹⁰⁹ Beforehand, the Court had never accepted that a libel case raises constitutional questions; previous rulings rather said that libellous publications were not protected by the scope of the

for the promotion and observance of the rights recognized in the present Covenant, agree upon the following articles: [...].’

¹⁰⁷ E J Eberle, ‘Public Discourse in Contemporary Germany’ (1997) 47 *Case Western Reserve Law Review* 797, 900-01.

¹⁰⁸ *New York Times v Sullivan*, 376 US 254, 283 (1964).

¹⁰⁹ *Ibid*, at p 295 (Black J concurring); see also E Tison, ‘Straddling the Fence: Justice Breyer’s concurrence in *Bartnicki v Vopper* gives Protection of Privacy and still Manages to Protect the Press: *Bartnicki v Vopper*, 532 US 514 (2001)’ (2003) 27 *Southern Illinois University Law Journal* 661, 662.

First Amendment at all.¹¹⁰ The underlying rationale of the extension was to provide breathing space for the press to report about matters of public concern.¹¹¹ An important implication of this ruling was the ‘constitutionalisation’ of the private law sphere.¹¹² One of the major issues the Court had to deal with was as to whether the Fourteenth Amendment is directed against state action as distinct from private conduct. According to the Court, it matters not that private parties were involved in a civil action based on common law.¹¹³

This constitutional privilege was later explicitly applied to the public disclosure tort.¹¹⁴ The exact constitutional impact on private law is opaque though. It is nevertheless plain that the constitution operates directly to control and delimit governmental power; it does not (directly) govern the relationship of purely private actors.¹¹⁵ The Constitution provides a value-neutral scheme of negative liberties and therefore concentrates on limiting official power; the state has thus no positive obligation to protect the rights of citizens.¹¹⁶ The Supreme Court of California later observed that ‘newsworthiness’ was an element of the tort as well as a constitutional defence. It is hence not nec-

¹¹⁰ J Rozenberg *Privacy and the Press* (2004) 175; see also D A Logan, ‘Tort Law and the Central Meaning of the First Amendment’ (1990) 51 *University of Pittsburgh Law Review* 493, 505. The Court cited John Stuart Mill and John Milton in support of its opinion – *New York Times v Sullivan*, 376 US 254, 272 fn 13, at p 279 fn 19 (1964).

¹¹¹ R A Smolla, ‘Privacy and the First Amendment Right to Gather News’ (1999) 67 *George Washington Law Review* 1097, 1135.

¹¹² See E J Eberle, ‘Human Dignity, Privacy, and Personality in German and American Constitutional Law’ [1997] *Utah Law Review* 963 fn 170; see also G E White, *Tort Law in America: An intellectual History* (expanded ed, 2003) 176, where White observes that the tort became nearly ‘constitutionalized’ by the 1970s; W P Keeton (ed), *Prosser and Keeton on Torts* (5th ed, 1984) 857; S W Halpern, ‘The ‘In-violate Personality’ Warren and Brandeis after One Hundred Years’ [1990] *Northern Illinois University Law Review* 387, 397; D A Logan, ‘Tort Law and the Central Meaning of the First Amendment’ (1990) 51 *University of Pittsburgh Law Review* 493, 494, who argues that the result of *New York Times v Sullivan* has been ‘an overlay of constitutional protections.’

¹¹³ *New York Times v Sullivan*, 376 US 254, 265 (1964).

¹¹⁴ *Gilbert v Medical Economics Co*, 665 F 2d 305, 307 (1981); *Campbell v Seabury Press*, 614 F 2d 395, 397 (1980). See also D A Logan, ‘Tort Law and the Central Meaning of the First Amendment’ (1990) 51 *University of Pittsburgh Law Review* 493, 494 and B Gormley, ‘A Hundred Years of Privacy’ [1992] *Wisconsin Law Review* 1335, 1387.

¹¹⁵ J Lenow, ‘First Amendment Protection for the Publication of Private Information’ (2007) 60 *Vanderbilt Law Review* 235, 252-3. Lenow also mentions a ‘state action doctrine,’ which can subject private persons to Constitutional obligation, but concludes with the inapplicability of this doctrine in the relevant context – at p 253 fn 76. For further details regarding this doctrine see S Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102 *Michigan Law Review* 387, 412-3.

¹¹⁶ E J Eberle, ‘Human Dignity, Privacy, and Personality in German and American Constitutional Law’ [1997] *Utah Law Review* 963, 969, 1048; see also M Tushnet, ‘An Essay on Rights’ (1984) 62 *Texas Law Review* 1363, 1393.

essary to attempt ‘to keep rigorously separate the tort and constitutional issues as regards newsworthiness.’¹¹⁷ A principled approach is arguably not identifiable,¹¹⁸ but there are broad similarities to what will be addressed as ‘indirect horizontal effect’ (due to the fact that the power of the states to award civil damages is delimited by the First Amendment)¹¹⁹ later on during the discussion of the remaining legal systems.¹²⁰

1.2.4 Constitutional viability of the public disclosure tort

What are the implications of this extension? The essential problem with which the courts were confronted henceforth could be outlined as follows: if the First Amendment is understood to protect the dissemination of truthful information at its untouchable core, such a right to privacy is in direct conflict with the First Amendment.¹²¹ Consequently, any attempt to regulate the flow of true private information would inevitably impose unconstitutional restrictions on speech rights. Such a First Amendment doctrine, as outlined above, would make the existence of the public disclosure branch of the privacy tort impossible; the First Amendment would entirely ‘swallow’ the private facts tort simply because it cannot exist within this constitutional framework.¹²² On the other hand, if the essence of the First Amendment speech is understood as guaranteeing the free flow of ideas and opinions on matters of ‘public interest’ or ‘public concern’ respectively, restricting the dissemination of truthful information cannot be regarded as unconstitutional *per se*.¹²³ Instead, the settlement of the conflict between privacy and free speech would consist in a balancing process of some kind in order to determine

¹¹⁷ *Shulman v Group W Productions Inc*, 18 Cal 4th 200, 216 (1998).

¹¹⁸ S W Halpern, ‘Rethinking the Right of Privacy: Dignity, Decency, and the Law’s Limitations’ (1991) 43 *Rutgers Law Review* 539, 549 - Halpern recognises that a ‘Byzantine structure’ has developed as a result of constitutionalisation of communicative torts.

¹¹⁹ See, eg, *Morgan by and through Chambon v Celender*, 780 F Supp 307, 310 (1992).

¹²⁰ See also P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 180; R A Smolla, ‘Accounting for the Slow Growth of American Privacy Law’ (2002) 27 *Nova Law Review* 289, 297, who notes that the newsworthiness element is ‘incorporated by common law doctrine and mandated by First Amendment.’

¹²¹ R A Smolla, ‘Information as a Contraband: The First Amendment and Liability for Trafficking in Speech’ (2002) 96 *Northwestern University Law Review* 1099, 1110.

¹²² *Ibid*, at p 1112; see also P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 156-7; J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ (1996) 55 *Maryland Law Review* 425, 443-4; J Lenow, ‘First Amendment Protection for the Publication of Private Information’ (2007) 60 *Vanderbilt Law Review* 235, 281.

¹²³ E J Bloustein, ‘Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional as Well?’ (1968) 46 *Texas Law Review* 611, 622.

whether speech on matters of public concern is at issue.¹²⁴ The dilemma in the United States can probably be best summed up by the difficulty in explaining precisely why and under which circumstances an interest in privacy protecting against the public dissemination of truthful information is consonant with the aforementioned democratic traditions of robust protection for free speech.¹²⁵ Thus, the major challenge is to construe a so-called newsworthiness element consonant with First Amendment doctrine, which does not swallow up the tort.¹²⁶

The Supreme Court first dealt with this question in *Cox Broadcasting Corp v Cohn*.¹²⁷ The plaintiff's 17-year-old daughter was a rape victim whose identity was published by the defendant who received this information from a court clerk. The Court was reluctant to 'address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and 14th Amendment.'¹²⁸ On the other hand, the Court acknowledged 'powerful arguments' in favour of a 'zone of privacy' worth of state protection whilst sidestepping its delineation.¹²⁹ These concessions notwithstanding, the public dissemination tort was singled out as particular problematic.¹³⁰ These statements circumscribe the underlying question whether the public dissemination tort is consonant with the supreme law; in other words whether or not this kind of 'violation of privacy is, as a tort, to be written out of the law.'¹³¹ On this occasion, it was not necessary to address the question because for the decision it was sufficient to deny recovery for the disclosure of facts that are a matter of public record.¹³² The US Supreme Court therefore only ruled that the privilege for

¹²⁴ R A Smolla, 'Information as a Contraband: The First Amendment and Liability for Trafficking in Speech' (2002) 96 *Northwestern University Law Review* 1099, 1110.

¹²⁵ According to P Gewirtz, the US Supreme Court has not marked out 'any area in which privacy trumps media prerogatives' - 'Privacy and Speech' [2001] *Supreme Court Review* 139, 157.

¹²⁶ See J A Jurata, 'The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts' (1999) 36 *San Diego Law Review* 489, 537.

¹²⁷ *Cox Broadcasting Corp v Cohn*, 420 US 469 (1975).

¹²⁸ *Ibid*, at p 491; D A Richards, 'Public and Private in the Discourse of the First Amendment' (2000) 12 *Cardozo Studies in Law and Literature* 61, 88-89.

¹²⁹ *Cox Broadcasting Corp v Cohn*, 420 US 469, 487 (1975) citing Warren and Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 196.

¹³⁰ *Ibid*, at p 489.

¹³¹ *Virgil v Time Inc*, 527 F 2d 1122, 1127 (1975); M Schadrack, 'Privacy and the Press: A Necessary Tension' (1985) 18 *Loyola of Los Angeles Law Review* 949, 953.

¹³² See *Florida Star v BIF*, 491 US 524, 532 (1989); K Ruckdaschel-Haley, 'The Florida Star v BIF: Balancing Freedom of the Press and the Right to Privacy upon Publication of a Rape Victim's Identity' (1990) 35 *South Dakota Law Review* 94, 105.

truthful, lawfully obtained public records was absolute; to hold otherwise, the Judges opined, would ‘invite timidity and self-censorship.’¹³³

In *Virgil v Time Inc*¹³⁴, the Federal Appellate Court attempted to further elucidate the relationship of privacy with freedom of speech. The Court opined that the protection of *all* true information ‘would seem to deny the existence’ of the public disclosure tort.¹³⁵ Instead, the Court explicitly adopted the ‘public concern’ standard, based on community mores, of the common law.¹³⁶ Accordingly, non-newsworthy true private facts were held to be not privileged by the First Amendment.¹³⁷

Later in *Florida Star v BJF*¹³⁸ the Supreme Court held that the revelation of a rape victim’s identity was privileged under the First Amendment.¹³⁹ In contrast to *Cox*, this case did not involve facts already available from a public record.¹⁴⁰ The Court extended First Amendment protection nevertheless because the victim’s identity was ‘legally obtain[ed] truthful information about a matter of public significance.’¹⁴¹ Moreover, the reportage about the commission and examination of a violent crime involved a ‘matter of paramount public importance.’¹⁴² The interest of protecting the identities of rape victims, by contrast, did not amount to the necessary ‘state interest of the highest order.’¹⁴³ This case exemplifies the general approach with which the courts determine a matter of legitimate public concern – the remaining central problem. The issue, at least known since 1967,¹⁴⁴ is usually treated at the highest level of generality, for instance,

¹³³ *Cox Broadcasting Corp v Cohn*, 420 US 496 (1975); see also P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 103; W P Keeton (ed), *The Law of Torts* (5th ed, 1984) 863, noting that the Court indicated receptivity to possible liability of facts that are not a matter of public record.

¹³⁴ 527 F 2d 1122 (1975).

¹³⁵ *Ibid*, at p 1128.

¹³⁶ *Ibid*, at p 1129.

¹³⁷ *Gilbert v Medical Economics Co*, 665 F 2d 305, 308 (1981).

¹³⁸ 491 US 524, 536-37 (1989).

¹³⁹ *Ibid*, at pp 530-1.

¹⁴⁰ However, the case was primarily decided on the ground that the state may not punish the publication of information provided by the state itself - J A Jurata, ‘The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts’ (1999) 36 *San Diego Law Review* 489, 500.

¹⁴¹ *Florida Star v BJF*, 491 US 524, 536 (1989).

¹⁴² *Ibid*, at p 536-7.

¹⁴³ *Ibid*, at p 537-8.

¹⁴⁴ E J Bloustein, ‘Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional as Well?’ (1968) 46 *Texas Law Review* 611, 628.

the public interest in rape as a criminal offence.¹⁴⁵ On the other hand, the Supreme Court paid little attention to the issue whether the victim's identity involved a public concern.¹⁴⁶ The determinative point was whether private information is 'relevant' to the report of the crime as the general matter.¹⁴⁷ The rape victim's identity was thus of public significance.¹⁴⁸ What should be regarded as relevant is to a high degree left up to the journalist, as the courts are reluctant to perform a judicial second-guessing on the matter.¹⁴⁹ The distinct issue as to whether mentioning of the identity, for instance, adds something to the understanding of the general matter is often left out by the courts.¹⁵⁰ However, the relevance-characteristic seems consistent with First Amendment doctrine inasmuch as speech is even-handedly treated, that is, regardless of its contents. As determinant for identifying matters of public concern as an element of the common law tort, we will revisit the relevance-requirement as a 'logical nexus' between specific private information and general matters of public concern.

The dissenting opinion¹⁵¹ criticised the majority's absolutist view and demanded balancing the interest in a free press 'against rival interests in a civilized and humane society.'¹⁵² This case is important because the Federal Supreme Court arguably laid the public disclosure tort to rest with its decision; it is today at least 'for most practical pur-

¹⁴⁵ D A Anderson, 'The Failure of American Privacy Law' in B S Markesinis (ed), *Protecting Privacy* (1999) 139, 151; K W Bacon, 'Florida Star v BJF: The Right of Privacy Collides with the First Amendment' (1990) 76 *Iowa Law Review* 139, 150-51 (1990); K Ruckdaschel-Haley, 'The Florida Star v BJF: Balancing Freedom of the Press and the Right to Privacy upon Publication of a Rape Victim's Identity' (1990) 35 *South Dakota Law Review* 94, 111; J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 272-3.

¹⁴⁶ J M Hilmert, 'The Supreme Court Takes on the First Amendment Privacy Conflict and Stumbles: Bartnicki v Vopper, the Wiretapping Act, and the Notion of Unlawfully Obtained Information' (2002) 77 *Indiana Law Journal* 639, 647; J Siprut, 'Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places' (2006) 33 *Pepperdine Law Review* 311, 331.

¹⁴⁷ D A Anderson, 'The Failure of American Privacy Law' in B S Markesinis (ed), *Protecting Privacy* (1999) 139, 151.

¹⁴⁸ K W Bacon, 'Florida Star v BJF: The Right of Privacy Collides with the First Amendment' (1990) 76 *Iowa Law Review* 139, 149; J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 250 (2007).

¹⁴⁹ See also P J Mc Nulty, 'The Public Disclosure of Private Facts: There is Life after Florida Star' (2001) 50 *Drake Law Review* 93, 108.

¹⁵⁰ D A Anderson, 'The Failure of American Privacy Law' in B S Markesinis (ed), *Protecting Privacy* (1999) 139, 152; see also P J Mc Nulty, 'The Public Disclosure of Private Facts: There is Life after Florida Star' (2001) 50 *Drake Law Review* 93, 111-2.

¹⁵¹ Written by Justice White and joined by Chief Justice Rehnquist and Justice O'Connor.

¹⁵² *Florida Star v BJF*, 491 US 524, 547 (1989).

poses dead.’¹⁵³ According to Justice White, the ruling ‘obliterate[s] one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts.’¹⁵⁴ However, the Court has consciously avoided pronouncing a general rule as to how the tension between freedom of speech and this privacy interest should be resolved.¹⁵⁵ The narrow holding of the Court in *Florida Star* did not mean that ‘truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press.’¹⁵⁶ The Court rather emphasised that the conflict between privacy and free speech has been solved in the discrete factual context of the specific case.¹⁵⁷

Shortly afterwards, Federal Courts were quick to declare that the public disclosure tort was not totally defunct.¹⁵⁸ Nevertheless, reviewed in aggregate it is fair to conclude that the Supreme Court left the tort *theoretically* intact, but left even less room for claimants to argue a successful claim – hence the *practical* death of the action.¹⁵⁹ The Court, as scholars emphasised in the aftermath, nonetheless placed particular emphasis on the lawfulness with which the personal material was obtained in *Cox* and *Florida Star*. The ‘lawfully obtained’ standard was therefore interpreted as the key to the tort’s constitutional viability.¹⁶⁰ The protection of legally obtained truthful information is deeply rooted in the USA.¹⁶¹

¹⁵³ A J McClurg, ‘Bringing Privacy out of the Closet: A Tort Theory for Intrusions in Public Places’ (1995) 73 *North Carolina Law Review* 989, 1002. See also P B Edelman, ‘Free Press v Privacy: Haunted by the Ghost of Justice Black’ (1990) 68 *Texas Law Review* 1195, 1198; P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 111; R A Smolla, ‘Privacy and the First Amendment Right to Gather News’ (1999) 67 *George Washington Law Review* 1097, 1101, who notes that the tort exists ‘more “in the books” than in practice.’

¹⁵⁴ *Florida Star v BJF*, 491 US 524, 550 (1989)

¹⁵⁵ *Gates v Discovery Communication Inc*, 131 Cal Rptr 2d 534, 544 (2003); see also *Virgil v Time Inc*, 527 F 2d 1122, 1127 (1975); *Ozer v Borquez*, 940 P 2d 371, 378 (Colo. 1997).

¹⁵⁶ *Florida Star v BJF*, 491 US 524, 541 (1989).

¹⁵⁷ *Ibid*, at p 530; see also J R Rolfs, ‘The Florida Star v BJF: The Beginning of the End for the Tort of Public Disclosure’ [1990] *Wisconsin Law Review* 1107, 1112.

¹⁵⁸ *Haynes v Alfred A Knopf Inc*, 8 F 3d 1222, 1232 (1993).

¹⁵⁹ See also J Lenow, ‘First Amendment Protection for the Publication of Private Information’ (2007) 60 *Vanderbilt Law Review* 235, 275, who argues that ‘no plaintiff stands a realistic chance’; J R Rolfs, ‘The Florida Star v BJF: The Beginning of the End for the Tort of Public Disclosure’ [1990] *Wisconsin Law Review* 1107, 1111; S W Halpern, ‘The ‘Inviolate Personality’ Warren and Brandeis after One Hundred Years’ [1990] *Northern Illinois University Law Review* 387, 398.

¹⁶⁰ J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ (1996) 55 *Maryland Law Review* 425, 456 citing C J Shapiro, *The First Amendment and the Private Domain*; see also P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 97; J R Rolfs, ‘The Florida Star v BJF: The Beginning of the End for the Tort of

It was only much later in *Bartnicki v Vopper*¹⁶², a case concerned with the constitutionality of the Wiretapping Act's disclosure provisions, that these hopes were partially disappointed.¹⁶³ The defendant broadcast an *illegally* taped phone call¹⁶⁴ made by the plaintiffs revealing a telephone number among other personal information. The media defendant in this case had *lawfully* obtained the information from its source.¹⁶⁵ The main question was whether the government would punish the ensuing publication based on a defect in the chain when the source for her part obtained the information unlawfully.¹⁶⁶ The case was concerned with private communication and therefore exemplifies the conflict as well as the interdependency of privacy and freedom of speech.¹⁶⁷

Once more, the US Supreme Court refused to answer the crucial question as to whether the publication of truthful material may ever be punished consistently with the First Amendment.¹⁶⁸ The Justices stated that the 'significance of the interests presented in clashes between the First Amendment and the privacy rights' led to a narrow ruling confined to the particular circumstances of the case.¹⁶⁹ However, all nine Justices accepted the premise that the conflict posed between speech and privacy was one between

Public Disclosure' [1990] *Wisconsin Law Review* 1107, 1127-8. The lawfully obtained doctrine provides 'that publicizing private information is constitutionally protected if three factors are met: (1) the information publicized was lawfully obtained; (2) the information concerns a matter of public significance; and (3) the imposition of liability does not serve a compelling state interest' - S M Scott, 'The Hidden First Amendment Values of Privacy' (1996) 71 *Washington Law Review* 683, 693.

¹⁶¹ R A Smolla, 'Accounting for the Slow Growth of American Privacy Law' (2002) 27 *Nova Law Review* 289, 304.

¹⁶² 532 US 514 (2001).

¹⁶³ The case is nevertheless instructive with regard to the public disclosure tort - R A Smolla, 'Accounting for the Slow Growth of American Privacy Law' (2002) 27 *Nova Law Review* 289, 305.

¹⁶⁴ An unidentified person intercepted and recorded a cell phone conversation - *Bartnicki v Vopper*, 532 US 514, 514 (2001).

¹⁶⁵ The defendant argued that he was not personally involved in the illegal recording, but the Court nevertheless accepted that he knew or had reason to believe that the interception was intentional and therefore unlawful - *ibid*, at p 525.

¹⁶⁶ *Ibid*, at p 515. See J H Hunt, 'Bartnicki v Vopper: Another Media Victory or Ominous Warning of a Potential Change in Supreme Court First Amendment Jurisprudence?' (2003) 30 *Pepperdine Law Review* 367, 374 for further details.

¹⁶⁷ *Bartnicki v Vopper*, 532 US 514, 537 (2001) per Justice Breyer (concurring); see also J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 257-8. For a discussion of the interdependency of both interests see R Gavison, 'Too Early for a Requiem: Warren and Brandeis were Right on Privacy v Free Speech' (1992) 43 *South Carolina Law Review* 437, 458.

¹⁶⁸ *Ibid*, at p 529 per Justice Stevens, at p 535 per Justice Breyer (concurring).

¹⁶⁹ *Ibid* (emphasis added).

two rights of constitutional stature.¹⁷⁰ Of greater interest was, of course, the reconciliation of the conflict.

A 6-3 (or rather 4-2-3)¹⁷¹ majority held that the First Amendment protected the publicity given to this phone call, but it reached this conclusion by ‘weighing’ the plaintiff’s interest in privacy (of communication) versus free speech interests. It has to be stressed, however, that the ‘pure’ conflict between privacy and freedom of speech was not at issue here. Since the privacy interest was related to private *communication*, both sides of the balance bore a relationship to interests in freedom of speech. *Bartnicki* is arguably not instructive if privacy interests unrelated to speech are at stake.¹⁷²

The decisive factor was the ‘newsworthiness’ of the information taped. Justice Stevens argued for the nominal majority as follows:¹⁷³

[i]n these cases privacy concerns give way when *balanced against the interest* in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: “The right of privacy does not prohibit any publication of matter which is of public or general interest.” [...] One of the costs associated with participation in public affairs is an attendant loss of privacy.

Even though it might be misleading to talk about balancing,¹⁷⁴ the majority put special emphasis on the public interest of the information involved. One scholar regarded this as a ‘backhanded’ victory for privacy as some judges ‘endorse[d] the prin-

¹⁷⁰ Ibid, at p 533 per Justice Stevens, at p 536 per Justice Breyer (concurring), at p 544 per Justices Rehnquist, Scalia and Thomas (dissenting); see also J H Hunt, ‘Bartnicki v Vopper: Another Media Victory or Ominous Warning of a Potential Change in Supreme Court First Amendment Jurisprudence?’ (2003) 30 *Pepperdine Law Review* 367, 374.

¹⁷¹ Stevens J delivered the opinion of the Court, in which Kennedy, Souter, Ginsburg, O'Connor and Breyer JJ joined. Breyer J filed a concurring opinion, in which O'Connor J joined. Rehnquist CJ filed a dissenting opinion, in which Scalia and Thomas JJ joined.

¹⁷² P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 194. See also R Kilkenney, ‘Invasion of Privacy for the Greater Good: Why Bartnicki v Vopper Deserves the Right of Privacy and the First Amendment’ (2003) 64 *Ohio State Law Journal* 999, 1002; E W Tiritilli, ‘You Never Call Me Anymore: Bartnicki v Vopper and the Supreme Court’s Abridgement of the Right of Privacy in Favor of the First Amendment Right of a Free Press’ (2002) 35 *Creighton Law Review* 729, 775.

¹⁷³ *Bartnicki v Vopper*, 532 US 514, 534 (2001).

¹⁷⁴ First Amendment scholars often contend that the Supreme Court is ‘smoking out’ illegitimate purposes for use of freedom of speech rather than performing a balancing exercise – eg, J Rubinfeld, ‘The First Amendment’s Purpose’ (2001) 53 *Stanford Law Review* 767, 786.

cipal ingredients of the “publication of private facts” tort, with its “newsworthiness” defence built in, as it exists at common law.’¹⁷⁵ Rodney Smolla argues that those courts that have struggled with this question most seriously over the years appear to recognise that the existence of this branch of the tort is only possible if juries and judges determine ‘newsworthiness’ through some balancing process including an assessment of community norms.¹⁷⁶

Nevertheless, the determination of a public concern was again crucial. The four judges of the nominal majority, represented by Stevens J, embarked on an attempt to develop ‘rigid constitutional rules’¹⁷⁷ but left the elusive public concern concept unexplored.¹⁷⁸ Consistent with *Florida Star*, the sole determinant of the nominal majority seems to have been the relevance of the disclosed personal material for the media coverage’s main topic.¹⁷⁹ Scholars interpret this as a modified version of Diane Zimmerman’s famous ‘leave it to the press model,’ because almost every private fact can be construed as being relevant to a public concern.¹⁸⁰

The remaining judges of the majority, Justices Breyer and O’Conner, favoured an *ad hoc* balancing test. Justice Breyer tried to strike a ‘reasonable balance’ by adopting a proportionality test.¹⁸¹ The learned Judge argued:¹⁸²

¹⁷⁵ R A Smolla, ‘Information as a Contraband: The First Amendment and Liability for Trafficking in Speech’ (2002) 96 *Northwestern University Law Review* 1099, 1149 -50; see also D P Paradis, ‘Bartnicki v Vopper: Cell Phones and Throwing Stones’ (2003) 37 *New England Law Review* 1117, 1150.

¹⁷⁶ *Ibid.*, at p 1110.

¹⁷⁷ D P Paradis, ‘Bartnicki v Vopper: Cell Phones and Throwing Stones’ (2003) 37 *New England Law Review* 1117, 1141; see also E Tison, ‘Straddling the Fence: Justice Breyer’s concurrence in Bartnicki v Vopper gives Protection of Privacy and still Manages to Protect the Press: Bartnicki v Vopper, 532 US 514 (2001)’ (2003) 27 *Southern Illinois University Law Journal* 661, 683-4.

¹⁷⁸ E W Tiritilli, ‘You Never Call Me Anymore: Bartnicki v Vopper and the Supreme Court’s Abridgement of the Right of Privacy in Favor of the First Amendment Right of a Free Press’ (2002) 35 *Creighton Law Review* 729, 786.

¹⁷⁹ See E Tison, ‘Straddling the Fence: Justice Breyer’s concurrence in Bartnicki v Vopper gives Protection of Privacy and still Manages to Protect the Press: Bartnicki v Vopper, 532 US 514 (2001)’ (2003) 27 *Southern Illinois University Law Journal* 661, 682.

¹⁸⁰ E W Tiritilli, ‘You Never Call Me Anymore: Bartnicki v Vopper and the Supreme Court’s Abridgement of the Right of Privacy in Favor of the First Amendment Right of a Free Press’ (2002) 35 *Creighton Law Review* 729, 786; see also P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 154; E Tison, ‘Straddling the Fence: Justice Breyer’s concurrence in Bartnicki v Vopper gives Protection of Privacy and still Manages to Protect the Press: Bartnicki v Vopper, 532 US 514 (2001)’ (2003) 27 *Southern Illinois University Law Journal* 661, 686-7.

¹⁸¹ P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 195; see also R Kilkenney, ‘Invasion of Privacy for the Greater Good: Why Bartnicki v Vopper Deserves the Right of Privacy and the

I would ask whether the statutes strike a *reasonable balance* between their speech-restricting and speech-enhancing consequences. Or do they instead impose *restrictions on speech* that are *disproportionate* when measured against their corresponding *privacy* and *speech-related benefits*, taking into account the *kind*, the *importance*, and the *extent of these benefits*, as well as the *need for the restrictions* in order to secure those benefits?

One scholar regarded this opinion as the beginning of greater privacy protection in speech-privacy cases.¹⁸³ Thus, the difference between both majority opinions could be found in the determination of a matter of a public concern. To Smolla, however, this broad acceptance appears to have another dimension since ‘it has been forcefully argued that treating the balance between privacy and speech interests as a conflict between two constitutional rights is misleading and wrong, because the Constitution only prohibits restrictions on speech or invasions of privacy *by the government*, and is silent about similar restrictions when they come from *private actors*.’¹⁸⁴ Smolla seems to imply that the acceptance of the newsworthiness defence would also be a backhanded victory for those arguing in favour of the applicability of a constitutional ‘right’ to privacy in cases between private litigators on both sides. The scholar therefore seems to outline a horizontal application of this ‘right.’

Solove summarises the implications of *Bartnicki* by mentioning, ‘it is appropriate to turn to the public disclosure tort cases for guidance on how courts have distin-

First Amendment’ (2003) 64 *Ohio State Law Journal* 999, 1025; J M Hilmert, ‘The Supreme Court Takes on the First Amendment Privacy Conflict and Stumbles: *Bartnicki v Vopper*, the Wiretapping Act, and the Notion of Unlawfully Obtained Information’ (2002) 77 *Indiana Law Journal* 639, 655 ([...] amorphous sort of ad hoc balancing test’); E Tison, ‘Straddling the Fence: Justice Breyer’s concurrence in *Bartnicki v Vopper* gives Protection of Privacy and still Manages to Protect the Press: *Bartnicki v Vopper*, 532 US 514 (2001)’ (2003) 27 *Southern Illinois University Law Journal* 661, 684; E B Easton, ‘Public Importance: Balancing Proprietary Interests and the Right to Know’ (2003) 21 *Cardozo Arts and Entertainment Law Journal* 139, 173.

¹⁸² *Bartnicki v Vopper*, 532 US 514, 536 (emphasis added).

¹⁸³ P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 141; see also B C Murchison, ‘Revisiting the American action for public disclosure of private facts’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 32, 50.

¹⁸⁴ R A Smolla, ‘Information as a Contraband: The First Amendment and Liability for Trafficking in Speech’ (2002) 96 *Northwestern University Law Review* 1099, 1110 (emphasis added).

guished between matters of public and private concern.’¹⁸⁵ Balancing is what seems to be required and ‘balancing means assessing the value of particular forms of speech against their costs.’¹⁸⁶ Privacy enthusiasts therefore seem to regard the implementation of the newsworthiness element¹⁸⁷ of the common law as First Amendment doctrine as a chance to revitalise the private facts tort.¹⁸⁸ There is one basic caveat though. ‘Assessing the *value* of particular *forms* of speech’ results in a content-based restriction of speech.¹⁸⁹ This would presuppose the possibility to distinguish, by way of illustration, the value of ‘political speech’ from ‘commercial speech.’¹⁹⁰ On this basis, however, the newsworthiness defence could not be implemented successfully without ‘anything short of a complete overhaul’ of the First Amendment doctrine.¹⁹¹ The present doctrine distinguishes between personal information *relevant* to a general matter of public concern and personal information *irrelevant* to such a matter. This approach, in contrast, strives for maintaining content-neutrality.

In sum, one can surely write volumes about this issue but at the end of the day the constitutional viability of the public disclosure tort depends on the following: a readiness to accord different weight or importance to different kinds of speech as distinct from maintaining content-neutrality at all costs. To my mind, this seemingly innocuous difference might distinguish a ‘civilised and humane society’¹⁹² from a society

¹⁸⁵ D J Solove, ‘The Virtues of Knowing Less: Justifying Privacy Protection against Disclosure’ (2003) 53 *Duke Law Journal* 967, 1001; see also P J Mc Nulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 133.

¹⁸⁶ *Ibid.*, at p 1037; see also P B Edelman, ‘Free Press v Privacy: Haunted by the Ghost of Justice Black’ (1990) 68 *Texas Law Review* 1195, 1215.

¹⁸⁷ As accepted in *Virgil v Time Inc.*, 527 F 2d 1122, 1129 (1975).

¹⁸⁸ See also N M Richards, ‘Reconciling Data Privacy and the First Amendment’ (2005) 52 *UCLA Law Review* 1149, 1200, who observes that scholars generally try to rejuvenate the private facts tort by determining ‘private’ speech or at least speech that is not a matter of public concern.

¹⁸⁹ D J Solove, ‘The Virtues of Knowing Less: Justifying Privacy Protection against Disclosure’ (2003) 53 *Duke Law Journal* 967, 984-5.

¹⁹⁰ See J Rubenfeld, ‘The First Amendment’s Purpose’ (2001) 53 *Stanford Law Review* 767, 824-6 for the concomitant difficulties and further details.

¹⁹¹ J Elford, ‘Trafficking in Stolen Information: A “Hierarchy of Rights” Approach to the Private Facts Tort’ (1995) 105 *Yale Law Journal* 727, 735; see also D J Solove, ‘The Virtues of Knowing Less: Justifying Privacy Protection Against Disclosure’ (2003) 53 *Duke Law Journal* 967, 984-5.

¹⁹² *Florida Star v B.J.F.*, 491 US 524, 547 (1989).

in which a mildly disguised ‘eat or be eaten’¹⁹³ doctrine epitomises both ethereal heights and reality’s dull planes of constitutional speech review.

1.3 Brief excursion to ‘hate speech’ and ‘fighting words’

A meaningful account of the First Amendment’s constitutional review should include a brief overview of the ‘tough’ cases. Perhaps every jurisdiction struggles with the appropriate handling of so-called hate speech and fighting words. Similar to the adjudication of private information, both categories require a restriction based on content.¹⁹⁴ Translated into real world experience, content-neutrality means in this area of speech adjudication that a state may prohibit ‘fighting words’ as a *whole*, but not *selective* fighting words based, for instance, on race and colour.¹⁹⁵

The Court has initially used shorthand formulas saying that these types of speech are ‘not within the area of constitutionally protected speech’ or that the ‘protection of the First Amendment does not extend’ to them.¹⁹⁶ This technique will be discussed later as definitional balancing. The Court has indicated, however, that these categories may not be regulated freely without *any* First Amendment protection. According to Lenow, the US Supreme Court’s First Amendment conflict resolution in this area ‘appear to be rather clumsy attempts to mask what ultimately is a simple exercise in balancing the weight of the interests on each side of the speech equation discounted by the available alternative means available to further these interests.’¹⁹⁷

¹⁹³ The central principle of Darwinism is, of course, the theory of evolution by natural selection – H Hovenkamp, ‘The Marginalist Revolution in Legal Thought’ (1993) 46 *Vanderbilt Law Review* 305, 306.

¹⁹⁴ See *RAV v City of St Paul*, 505 US 377, 400 (1992); see also P J Mc Nulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 138 who points to similarities of the tort’s public concern element with the adjudication of so-called obscene speech. See also P Rishworth, G Hushcroft, S Optician and R Mahoney, *The New Zealand Bill of Rights* (2003) 323 (Hereinafter Rishworth et al, *The New Zealand Bill of Rights* (2003)).

¹⁹⁵ E Kagan, ‘Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine’ (1996) 63 *University of Chicago Law Review* 413, 417 citing *RAV v City of St Paul*, 505 US 377 (1992); see also S J Heyman, ‘Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression’ (1998) 78 *Boston University Law Review* 1275, 1380-81. Compare *Virginia v Black*, 538 US 343, 358 (2003), where the Court singled out Ku Klux Klan related cross burning because of its ‘particularly virulent form of intimidation.’

¹⁹⁶ *RAV v City of St Paul*, 505 US 377, 383 (1992) (internal citations omitted).

¹⁹⁷ J Lenow, ‘First Amendment Protection for the Publication of Private Information’ (2007) 60 *Vanderbilt Law Review* 235, 246 (2007); see also B L Pedersen, ‘Florida Star v BJJ: The Rape of the Right to Privacy’ (1990) 23 *John Marwill Law Review* 731, 751.

The Court's unexpected reference to 'responsibility' and 'morality' is nevertheless significant. These notions are, as we have seen, otherwise absent from the First Amendment's doctrinal framework. Interestingly, one scholar interprets these decisions as being consistent with Kant's concepts of the autonomous and socially responsible individual.¹⁹⁸ Wells argues cautiously and this observation might indeed be overambitious since the Court takes refuge in *communal* responsibility¹⁹⁹ and the *communal* interest in morality.²⁰⁰ Individual responsibility is therefore irrelevant as distinct from a Kantian approach.²⁰¹ Nonetheless, it is important to observe the Court's unusual readiness to engage in 'normative' or 'value judgments.' Proponents of negative liberty usually concede that liberty must sometimes yield to other values at some point. The restriction of liberty, however, is regarded as a 'politically *neutral* statement of what liberty, properly understood, really is;' a value or normative judgment is in theorem strictly to be eschewed.²⁰² This might explain the problems of the Supreme Court – such an approach is arguably only possible by means of *definitional* balancing as opposed to the balancing of conflicting interests. Rubenfeld argues that even this limited form of balancing is unconstitutional, because it attributes a lower value to certain kinds of speech.²⁰³ Nevertheless, the Court's jurisprudence regarding relevant privacy interests and fighting words can be summarised by saying that they reflect 'both an inability

¹⁹⁸ C E Wells, 'Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence' (1997) 32 *Harvard Civil Rights-Civil Liberties Law Review* 159, 193; see also E Volokh, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking about You' (2000) 52 *Stanford Law Review* 1049, 1113 - Volokh notes that scholars have defended restrictions of sexually themed speech on grounds of dignity.

¹⁹⁹ *RAV v City of St Paul*, 505 US 377, 392 (1992) ('[i]t is the *responsibility*, even the obligation, of diverse *communities* to confront such notions in whatever form they appear' – emphasis added, internal citations omitted).

²⁰⁰ *Chaplinsky v New Hampshire*, 315 US 568, 571-2 (1942) ('There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem[...]. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the *social interest in order and morality*' – emphasis added); *RAV v City of St Paul*, 505 US 377, 400 (1992) ('within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required' – emphasis supplied; internal citations omitted).

²⁰¹ For a distinction between the two approaches see also more specifically K Kersch, 'The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law' (2005) 4 *Washington University Global Studies Law Review* 345, 370 ('Were the Court to look abroad to Europe's free speech jurisprudence, particularly as it concerns matters of 'hate speech,' it would trouble many who value the Court's recent expansive readings of free speech protections').

²⁰² R M Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1, 6 (emphasis added).

²⁰³ J Rubenfeld, 'The First Amendment's Purpose' (2001) 53 *Stanford Law Review* 767, 824.

and an unwillingness to come to terms, directly and plainly, with the regulation of content of what a speaker says.’²⁰⁴

The reason may well be the constitutional focus on ‘negative liberty’ and the ‘episodic’ rather than ‘systematic’ nature of the approach adopted for interpreting the First Amendment. On the other hand, modern human rights instruments contain limitation clauses such as s 5 NZBoRA or art 8 (2) ECHR, which require a systematic rather than episodic approach on speech regulation.²⁰⁵ As will be discussed below, Tipping J’s approach in *Hosking* is an illustrative example of such an approach.

1.4 Conclusion on the constitutional law

Seen from the perspective of comparative law, the US approach is generally ‘quite extreme’ and ‘at the far end of the spectrum;’ according to Gewirtz, ‘[n]o other democratic country forbids restrictions on expressive conduct as completely as the United States.’²⁰⁶ One may thus argue that the country’s interpretation of free speech is not particularly successful on a global marketplace of ideas.²⁰⁷ The US Supreme Court strongly emphasises the systemic value of speech, which provides the fertile ground allowing these extreme results to blossom. All utterances are of equal importance to public discourse, as the argument goes slightly simplified, any ideas entering the marketplace will thus not be restricted. The Court has consequently established a tradition of extremely narrow rulings,²⁰⁸ which left the speech-privacy conflict itself ‘uncharted’²⁰⁹ however. If and under which circumstances the publication of true information may im-

²⁰⁴ See V Mayer-Schonberger, T E Foster, ‘More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law’ (1995) 18 *Boston College International and Comparative Law Review* 59, 60.

²⁰⁵ See generally A Barak, ‘Proportional Effect: The Israeli Experience’ (2007) 57 *University of Toronto Law Journal* 369, 369-70

²⁰⁶ P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 188; see also D A Elder, ‘Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwork’s Attempts to Circumvent New York Times v Sullivan’ (2007) 9 *Vanderbilt Journal of Entertainment and Technology Law* 551, 552.

²⁰⁷ See K Kersch, ‘The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law’ (2005) 4 *Washington University Global Studies Law Review* 345, 347 (2005).

²⁰⁸ D P Paradis, ‘Bartnicki v Vopper: Cell Phones and Throwing Stones’ (2003) 37 *New England Law Review* 1117, 1143 (2003).

²⁰⁹ *Bartnicki v Vopper*, 532 US 514, 530 fn 5 (2001).

pose civil liability is vague as a result.²¹⁰ In the law's present state, the conflict's solution will be a matter of legal first impression each time.²¹¹

From here, two key implications can be distilled. First, the Supreme Court tacitly implicated a possible co-existence of the private facts torts with the First Amendment.²¹² The Court was well aware of the conflict's gravity and had the chance to write the tort out of the law several times. It did not do so.²¹³ The reason for this is most likely the Court's acknowledgement of the public concern or newsworthiness element, which nourishes the tort's theoretical constitutional viability. Secondly, the Court's natural preference for bright-line-tests in order to perform constitutional review (of speech restriction based on its content) is arguably incompatible with the necessity to decide what actually *is* and what is *not* in the generally acknowledged public interest. In the background lurks the context sensibility, which evolved as a prevalent characteristic of the speech-privacy conflict.²¹⁴ A supposed bright line test which 'sweep[s] no more broadly than the appropriate context of the instant case'²¹⁵ simply is no such rigid constitutional rule. The analytical approach of the Supreme Court is hence entirely *ad hoc*.²¹⁶

Even though the rulings can be interpreted as saying that the public dissemination tort is not unconstitutional per se, informational privacy was not afforded the sys-

²¹⁰ M Schadrack, 'Privacy and the Press: A Necessary Tension' (1985) 18 *Loyola of Los Angeles Law Review* 949, 950; see also B L Pedersen, 'Florida Star v BJJ: The Rape of the Right to Privacy' (1990) 23 *John Marwill Law Review* 731, 751; E W Tiritilli, 'You Never Call Me Anymore: Bartnicki v Vopper and the Supreme Court's Abridgement of the Right of Privacy in Favor of the First Amendment Right of a Free Press' (2002) 35 *Creighton Law Review* 729, 764; J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 281-2.

²¹¹ J M Hilmert, 'The Supreme Court Takes on the First Amendment Privacy Conflict and Stumbles: Bartnicki v Vopper, the Wiretapping Act, and the Notion of Unlawfully Obtained Information' (2002) 77 *Indiana Law Journal* 639, 659.

²¹² J A Jurata, 'The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts' (1999) 36 *San Diego Law Review* 489, 504; see also D J Solove, 'The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure' (2003) 53 *Duke Law Journal* 967, 988.

²¹³ See also J R Rolfs, 'The Florida Star v BJJ: The Beginning of the End for the Tort of Public Disclosure' [1990] *Wisconsin Law Review* 1107, 1111, who observes, '[y]et if the Court is reluctant to punish truthful publication, it is equally reluctant to grant the press a blanket privilege to publish truth.'

²¹⁴ See *Bartnicki v Vopper*, 532 US 514, 529 per Stevens J.

²¹⁵ *Florida Star v BJJ*, 491 US 524, 533 (1989).

²¹⁶ J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 237.

temic value arguably necessary to challenge free speech interests in that country.²¹⁷ Furthermore, it is important to note that the determination of the public interest element of the tort is firmly in the hands of First Amendment jurisprudence. The element originates from the public disclosure tort and as such from the common law,²¹⁸ but it has to be interpreted in the light of the Supreme Court decisions.²¹⁹ Judges deciding a common law case unavoidably have to reproduce First Amendment doctrine while determining a matter of public concern. To turn the argument on its head, it says that judges in other common law jurisdictions (for instance New Zealand) cannot use modern common law cases provided by US jurisdictions – at least not without importing First Amendment jurisprudence through the back door.²²⁰

All relevant decisions addressing the speech-privacy conflict have in common that the courts have consistently ruled against the protection of the privacy interest.²²¹ If privacy were an interest worth protecting, it would mock this interest straightaway if defendants could control liability by defining ‘newsworthy’ interests.²²² The control about personal information is nonetheless largely vested in the defendant’s hands. The clearest determinant for a public concern seems to be the relevance-criterion, which allows balancing of speech and privacy interests only to a marginal extent. The basic hindrance is again the Court’s strong emphasis on the marketplace of ideas theory, which postulates that content-neutrality has to be maintained. The single determinant of judging a particular thought’s power is then the competition in the marketplace.²²³ Since finding the ‘truth’ is perhaps the chief purpose of this theory, a State cannot restrict the flow of truthful information in general – including the type of information theoretically

²¹⁷ See P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 165, 172. The systemic importance had been mentioned in *Virgil v Time Inc*, 527 F 2d 1122, 1128 fn 7 (1975).

²¹⁸ *Vassiliades v Garfinkel’s Brooks Bros Inc*, 492 A 2d 580, 589 (1985).

²¹⁹ See also B C Murchison, ‘Revisiting the American action for public disclosure of private facts’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 32, 46.

²²⁰ We will later see, however, that precisely this happened (obiter) in *Andrews v TVNZ Ltd* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J).

²²¹ J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ 55 *Maryland Law Review* 425, 448 (1996); J Lenow, ‘First Amendment Protection for the Publication of Private Information’ (2007) 60 *Vanderbilt Law Review* 235, 276.

²²² *Ibid*, at p 443; see also *Hosking* [2005] 1 NZLR 1 (CA) para 76 per Gault P and Blanchard J.

²²³ *Abrams v United States*, 250 US 616, 630 (1919) per Holmes J (dissenting).

protected by the public disclosure tort.²²⁴ As McClurg has observed: '[g]iven the current state of the law, it is quite possible that the public disclosure tort is "unconstitutional" under the First Amendment.'²²⁵ In sum, given that the Court would follow its usual path consequently as opposed to ping-ponging between irreconcilable positions, the public dissemination tort would have to be written out of the law.²²⁶

For the meaningful protection of private information in other jurisdictions, this has in turn two important implications:

- Restricting truthful private information must be possible;²²⁷
- Speech itself should be categorised according to the importance of its contents to informed public discourse.

This becomes clear when one takes a closer look at Breyer J's judgment in *Bartnicki*. Murchison has argued that 'Justice Breyer strongly suggested that the analogous public disclosure was neither dead nor obsolete.'²²⁸ However, such a statement must continue to point out why this is the case. The Judge tried to strike a 'reasonable balance', a balance where the 'restrictions on speech' are not 'disproportionate' to the 'speech related benefits.'²²⁹ In order to determine the benefits of speech, one has to look at its content however. Gewirtz's assumption that this judgment marks the beginning of greater privacy protection in the USA seems unlikely though – Breyer J's ap-

²²⁴ See B L Pedersen, 'Florida Star v BJJ: The Rape of the Right to Privacy' (1990) 23 *John Marwill Law Review* 731, 743.

²²⁵ A J McClurg, 'Kiss and Tell: Protecting Intimate Relationship Privacy through Implied Contracts of Confidentiality' (2006) 74 *University of Cincinnati Law Review* 887, 888.

²²⁶ See also J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 268 (2007); J B Mintz, 'The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain' (1996) 55 *Maryland Law Review* 425, 431 fn 35 (arguing that resort to 'marketplace' merely accentuates the problem); A J McClurg, 'Kiss and Tell: Protecting Intimate Relationship Privacy through Implied Contracts of Confidentiality' (2006) 74 *University of Cincinnati Law Review* 887, 888; E Volokh, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking about You' (2000) 52 *Stanford Law Review* 1049, 1122 (arguing that restriction of personal information is unconstitutional unless contents protected by explicit or implied contract); E B Easton, 'Public Importance: Balancing Proprietary Interests and the Right to Know' (2003) 21 *Cardozo Arts and Entertainment Law Journal* 139, 174 – Easton identifies the most sensible interpretation of *Bartnicki v Vopper* as saying: 'the right to know simply trumps all privacy interests.'

²²⁷ See *Virgil v Time Inc.*, 527 F 2d 1122, 1128 (1975).

²²⁸ B C Murchison, 'Revisiting the American action for public disclosure of private facts' in M Richardson and A T Kenyon (ed), *New Dimensions in Privacy Law* (2006) 32, 49.

²²⁹ *Bartnicki v Vopper*, 532 US 514, 536 (2001) Breyer and O'Connor JJ concurring.

proach represents nothing short of the complete overhaul of First Amendment doctrine.²³⁰ The Judge is open-minded with respect to comparative law²³¹ and his ruling seems to invoke the terminology used in Europe and elsewhere – in short, in systems not as extreme as the US model.²³² The very notion of regarding comparative law as an option while interpreting the Constitution, as required by Breyer J's judgment, seems to make other judges of the Supreme Court run for the door however.²³³ At least with the current majority in the Court, this attitude is unlikely to change.²³⁴

2 The public dissemination tort

We will now turn to the 'micro-level' of our analysis and, thus, to the private facts tort itself. As we know, the famous law review article 'The Right to Privacy',²³⁵ is commonly regarded as the basis for the recognition of privacy interests in the USA. Warren, one of its authors, felt uncomfortable with the way the 'yellow press' observed the social life of his family and himself.²³⁶ Hence, it seems as if a typical 'paparazzo scenario' triggered off the discovery of a right to privacy with the later public disclosure tort being Warren and Brandeis' chief concern.²³⁷ Even though they clearly identified

²³⁰ Gewirtz explicitly recognises this by mentioning Justice Breyer's 'little observed but important ongoing effort to develop a new approach to the First Amendment generally' - P Gewirtz, 'Privacy and Speech' [2001] *Supreme Court Review* 139, 141.

²³¹ See K Kersch, 'The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law' (2005) 4 *Washington University Global Studies Law Review* 345-6 Kersch argues that the judgments of, *inter alia*, Justices Breyer and O'Connor are calculated steps 'to bring the [US Supreme] Court's approach toward constitutional interpretation into line with new approaches being taken by justices in the courts of other countries.'

²³² D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 384 ('In a number of recent decisions Justice Breyer has shown an interest in introducing proportionality analysis into US constitutional law, [...]').

²³³ See K Kersch, 'The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law' (2005) 4 *Washington University Global Studies Law Review* 345, 370; see also W Brown Scott, 'Oliver Wendell Holmes on Equality and Adarand' (2003) 47 *Howard Law Journal* 59, 63; D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 384.

²³⁴ See also D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 384. A thoughtful account concerned with the underlying problems is R C Post and R Siegel, 'Originalism as a political Practice: The Right's Living Constitution' (2006) 75 *Fordham Law Review* 545-592.

²³⁵ S D Warren and L Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

²³⁶ W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

²³⁷ See also A J McClurg, 'Kiss and Tell: Protecting Intimate Relationship Privacy through Implied Contracts of Confidentiality' (2006) 74 *University of Cincinnati Law Review* 887, 896; R A Smolla, 'Accounting for the Slow Growth of American Privacy Law' (2002) 27 *Nova Law Review* 289, 296; S W Halpern, 'Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations' (1991) 43 *Rut-*

the conflict with freedom of speech,²³⁸ both authors could not possibly foresee the constitutional problems that occurred later on due to the Supreme Court's rulings. When the article was published in 1890, no court had held the First Amendment applicable to the states via the Fourteenth Amendment.²³⁹

However, it seems worthwhile mentioning that this seminal article on privacy was published around the same time when Social Darwinism influenced First Amendment marketplace of ideas theory back in 1919. The time roughly around 1890-1920 was called the 'progressive era' in the USA in which particularly Social Darwinism and marginalism²⁴⁰ were 'viewed as complementary models of human behavior'.²⁴¹ It seems as if the public disclosure tort originates from the same historical period as the cause for its later death for practical purposes. Particularly the stronger influence of Social Darwinian First Amendment doctrine in the wake of *New York Times v Sullivan* would offer an instructive insight into Harry Kalven's observation; the scholar famously noticed that the newsworthiness element of the public disclosure branch was 'so overpowering as virtually to swallow the tort'²⁴² with its protected privacy interest. This observation is paraphrasing, of course, the classic theme of Darwinism. As will presently appear, with the extension of the constitutional privilege to speech involved in the common law privacy action, quintessentially Holmesian tort theory was finally united with Holmesian First Amendment doctrine. Whitman argues that Warren and Brandeis' article, by contrast, was rather an aberration in this doctrinal framework due to incompatible European influences.²⁴³ As a result, cases once regarded as flagships²⁴⁴ of a

gers Law Review 539, 543-4.

²³⁸ S D Warren and L D Brandeis, 'The Right to Privacy, (1890) 4 *Harvard Law Review* 193, 214; see also Note 'The Right of Privacy' (1906-07) 12 *Virginia Law Register* 91, 92; *Brents v Morgan*, 299 SW 967, 970 (1927).

²³⁹ *Hall v Post*, 372 SE 2d 711, 713 (1988).

²⁴⁰ See H Hovenkamp, 'The Marginalist Revolution in Legal Thought' (1993) 46 *Vanderbilt Law Review* 305, 308 for further details.

²⁴¹ Ibid; see also his 'Knowledge about Welfare: Legal Realism and the Separation of Law and Economics' (2000) 84 *Minnesota Law Review* 805, 808. Hovenkamp mentions - at p 810 - a third characteristic underlying the progressive thought: 'objective welfare judgments, which are basically judgments about welfare that do not depend on assumptions about other people's mental states.' See generally R S Summers, 'Pragmatic Instrumentalism in Twentieth Century Legal Thought - A Synthesis and Critique of our Dominant Legal Theory about the Law and its Use' (1980-81) 66 *Cornell Law Review* 861, 869-70.

²⁴² H Kalven, Jr, 'Privacy in Tort Law-Were Warren and Brandeis Wrong?' (1966) 31 *Law and Contemporary Problems* 326, 336.

²⁴³ J Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151, 1205-6. Whitman may be right in the conclusion to which he came and yet he does not

successful public disclosure tort, such as *Briscoe v Reader's Digest*²⁴⁵, were later explicitly overruled in the light of the Supreme Court's expansive First Amendment jurisprudence.²⁴⁶ The New Zealand Court of Appeal, in contrast, still called *Melvin v Reid*²⁴⁷ 'the leading case in this area.'²⁴⁸

In the following, the elements of the public disclosure tort will be discussed. Maintaining the modesty of the approach I adopt, the following expositions will predominantly serve as a counterexample as to how a tort is perhaps not to be fashioned ideally – particularly in the light of its supposed consistency with a human rights instrument such as the NZBoRA. It might hence be advantageous to pretend that Prosser's widely shared views are by some remarkable set of circumstances not sculptured in marble. The USA has after all a quite chequered history in protecting informational privacy.²⁴⁹

2.1 Elements of the tort according to the Restatement

The credit for the contemporary formulation of the torts is routinely attributed to Prosser. Back in 1960, he evaluated about 300 cases, which he categorised into four different branches.²⁵⁰ Outside the USA, on the other hand, it is accepted that only

capture the full picture. The problem rather seems to be that human dignity withers under the might of First Amendment doctrine – see *Shulman v Group W Production Inc*, 18 Cal 4th 200, 243 (1998) per Kennard J (concurring) for an illuminating analysis. *Virgil v Time Inc*, 527 F 2d 1122, 1128 fn 8 (1975) ('[...] for privacy, no less than reputation, "reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty"' – internal citation omitted).

²⁴⁴ Eg, *Hosking* [2005] 1 NZLR 1 (CA) para 69 per Gault P and Blanchard J.

²⁴⁵ *Briscoe v Reader's Digest Association Inc*, 93 Cal Rptr 866 (1971).

²⁴⁶ *Gates v Discovery Communications Inc*, 131 Cal Rptr 2d 534, 539 (2003); see also *Shulman v Group W Production Inc*, 18 Cal 4th 200, 246 (1998) per Kennard J (concurring); the same conclusion was reached by R Gavison, 'Too Early for a Requiem: Warren and Brandeis were Right on Privacy v Free Speech' (1992) 43 *South Carolina Law Review* 437, 452 fn 44 (1992).

²⁴⁷ 112 Cal App 285 (1931).

²⁴⁸ *Hosking* [2005] 1 NZLR 1 (CA) para 69 per Gault P and Blanchard J.

²⁴⁹ Consider J Rosen, 'Continental Divide' [2004] *Legal Affairs* 49, 53; see also A J McClurg, 'Bringing Privacy Law Out of The Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *North Carolina Law Review* 989, 1004, who observes that '[r]eview of the case law discloses a judicial wariness of - if not outright hostility towards - the invasion of privacy torts.'

²⁵⁰ W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 389: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) Public disclosure of embarrassing private facts about the plaintiff (3) Publicity which places the plaintiff in the public eye; (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. However, Prosser discussed the so-called 'Right of Privacy' under 'Miscellaneous' torts in his first edition (1941) of *Handbook of the Law of Torts*. In it, Prosser cited in passing an article from 1936 by a Gerald Dickler tellingly named 'The Right of Privacy:

Prosser's 'intrusion' and 'public disclosure branch' 'are squarely within anyone's conception of invasion of privacy' while the other two branches seem to be disregarded.²⁵¹ By 2001, forty-one states recognized the public disclosure tort.²⁵² It is important to note, however, that some states have acknowledged the public dissemination branch no earlier than the late 1990s although the tort had been repeatedly pronounced 'dead' at that time.²⁵³ This branch was generally rather slow to appear in the decisions of the courts.²⁵⁴ The reason for this moderate development is most likely the focus on intangible harm, which in turn was only slowly recognized as a tortious wrong.²⁵⁵ Prosser delineated the limits of the public disclosure of private facts tort as follows:

- the disclosure of the private facts must be a public disclosure, and not a private one;
- the facts disclosed to the public must be private facts, and not public ones;
- the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.²⁵⁶

A Proposed Redefinition.' Dickler distilled the first three categories – A L Peikoff, 'The Right to Privacy: Contemporary Reductionists and their Critics' (2006) 13 *Virginia Journal of Social Policy and the Law* 474, 489 ('It seems that Prosser owes much to Dickler, much more than he acknowledges in his various works on privacy [...]'); see also at p 489 fn 97, '[n]owhere does Prosser credit Dickler with identifying the original three categories of privacy cases.'

²⁵¹ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.4.01 at p 751; S W Halpern, 'Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations' (1991) 43 *Rutgers Law Review* 539, 543.

²⁵² P J McNulty, 'The Public Disclosure of Private Facts: There is Life after Florida Star' (2001) 50 *Drake Law Review* 93, 94; see also J B Mintz, 'The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain' (1996) 55 *Maryland Law Review* 425, 432 fn 37 for an exhaustive enumeration.

²⁵³ Examples are Colorado in *Ozer v Borquez*, 940 P 2d 371, 376-7 (1997), Washington (State) in *Reid v Pierce County*, 961 P 2d 333, 339 (1998) and Minnesota in *Lake v Wal-Mart Stores Inc*, 582 NW 2d 231, 236 (1998). Indiana, by contrast, seems undecided: compare *Doe v Methodist Hospital*, 690 NE 2d 681 (1997) with *Dietz v Finley Fine Jewellery Corp*, 754 NE 2d 958, 966 (2001), but the state is at least seriously considering the tort's application - see *Munsell v Hambricht*, 776 NE 2d 1272, 1282 (2002).

²⁵⁴ W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 392.

²⁵⁵ G E White, *Tort Law in America: An intellectual History* (expanded ed, 2003) 173. The first case was *Brents v Morgan*, 299 SW 967 (1927). The courts still seem to allow only little leeway to impose liability for causing emotional distress - K M. Beasley, 'Up-Skirt and other Dirt: Why Cell Phone Cameras and other Technologies Require a New Approach to Protecting Personal Privacy in Public Places' (2006) 31 *Southern Illinois University Law Journal* 69, 73.

²⁵⁶ W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 810-1.

Even though the elements of the private-facts tort vary slightly from jurisdiction to jurisdiction,²⁵⁷ the formulation of the Restatement (Second) of Torts (1977)²⁵⁸ is widely relied upon by the courts within the USA because it provides a useful general summary of the law.²⁵⁹ § 652 D of the Restatements characterises the tort as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy if the matter publicised is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

This definition involves the fourth feature of a successful tort – the problematic ‘legitimate public concern’ element. The Restatement refers to *Cox Broadcasting Co v Cohn* and mentions that it has not been established with certainty that liability of this nature is consistent with the free speech and free press provisions of the First Amendment to the Constitution.²⁶⁰

2.2 The gist of the action – common law or one-man-project?

We will first turn to the gist of the action, which is still the subject of lively debate. In this respect, it is a seldom pronounced truism that the chosen ‘civil wrong’ affects the appropriateness of means to protect it.²⁶¹ Therefore, if one does not know what kind of interest the tort actually protects, it will be difficult to determine how these interests could be protected meaningfully. At least for the ‘bottom up’ approach pursued here this is an essential point. We have noted that US law faces formidable problems when determining the protected interest on the speech-side of the speech-privacy con-

²⁵⁷ For recent formulations of the tort see, eg, *Taus v Loftus*, 40 Cal 4th 683, 717 (2007); *Cordts v Chicago Tribune Comp*, 860 NE 2d 444, 450 (2006); *Ozer v Borquez*, 940 P 2d 371, 377 (1997).

²⁵⁸ The Restatement contains ‘compilations of legal rules in a semi-legislative (or code) form’ - S E Hergert and S Wallace, ‘The German Free Law Movement as the Source of American Legal Realism’ (1987) 73 *Virginia Law Review* 399, 399. The American Law Institute has not yet attempted to reformulate the privacy torts for the Restatement (Third) - A J McClurg, ‘Kiss and Tell: Protecting Intimate Relationship Privacy through Implied Contracts of Confidentiality’ (2006) 74 *University of Cincinnati Law Review* 887, 907.

²⁵⁹ D L Zimmerman, ‘Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort’ (1983) 68 *Cornell Law Review* 291, 300; see also S K Sandeen, ‘Relative Privacy: What Privacy Advocates Can Learn from Trade Secret Law’ [2006] *Michigan State Law Review* 667, 691.

²⁶⁰ Special Note on Relation of § 652 D to the First Amendment to the Constitution.

²⁶¹ See, eg, P Kelley, ‘Infancy, Insanity and Infirmary in the Law of Torts’ (2003) 48 *American Journal of Jurisprudence* 179, 185 (‘[...] the definition of the wrong suffered in negligence may affect the tort liability of infants for alleged negligence’).

flict due to its focus on content neutrality. That the gist of the action is still subject to academic debates in the USA very much sums up the fundamental problems the country has with the public disclosure tort. It is not only the speech side but also the conflicting privacy interest that remains to be clarified. How a proper conflict resolution can be achieved under these circumstances stays in the dark.²⁶²

Prosser, however, formulated the gist of the public disclosure tort as follows:²⁶³

[t]his branch of the tort is evidently something quite distinct from intrusion. The interest protected is that of reputation, with the same overtones of mental distress that are present in libel or slander. It is in reality an *extension of defamation*, into the field of publication which do not fall within the narrow limits of the old torts, with the elimination of the defence of truth.²⁶⁴

The starting point for the relevant privacy tort is therefore the defamatory character of truthful but embarrassing facts. It is clear from this assertion that Prosser had a 'reductionist' view on privacy; privacy is not a distinct legal value to be protected in its own name but is necessarily related to other interests.²⁶⁵ The gravamen of the offence in defamation actions, however, was harm to reputation through falsity from their earliest appearance and long predating the development of English common law.²⁶⁶ Thus, one may wonder whether 'defamatory truth' exemplifies an oxymoron,²⁶⁷ other commenta-

²⁶² See also R Gavison, 'Too Early for a Requiem: Warren and Brandeis were Right on Privacy v Free Speech' (1992) 43 *South Carolina Law Review* 437, 456-7.

²⁶³ W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 398 (emphasis added); see also the discussion in *Doe v Methodist Hospital*, 690 NE 2d 681, 686-692 (1997).

²⁶⁴ For a recent repetition see *Doe v Methodist Hospital*, 690 NE 2d 681, 686 (1997). In *Beaumont v Brown*, 237 NW 2d 501, 505 (1976) the Court of Appeals of Michigan observed that the categorisation of a general 'right to privacy' into Prosser's tort composed of four branches was the result of solidifying earlier general pronouncements concerned with a 'right to privacy.' Citing Prosser the Court opined that this process was triggered off 'particularly in recognition of the *fact* that the tort of invasion of privacy overlaps with the torts of defamation and intentional infliction of mental distress [...] – emphasis provided).

²⁶⁵ See A L Peikoff, 'The Right to Privacy: Contemporary Reductionists and their Critics' (2006) 13 *Virginia Journal of Social Policy and the Law* 474, 478, 496; E J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962, 965. See also D J Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1124-5.

²⁶⁶ D L Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291, 307.

²⁶⁷ See S J Heyman, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression' (1998) 78 *Boston University Law Review* 1275, 1338-9 (1998) for distinctions and similarities of 'privacy' and 'reputation.' 'Privacy' is, for instance, virtually the only area of communication where 'more speech or information can never rectify the wrong' - S Ingber, 'Rethinking Intangible Inju-

tors have indeed contended that the tort protects only against emotional harm and ignore or deny the relevance of reputational injury.²⁶⁸ Rather unsurprisingly, Prosser's gist of the action has sparked a vast body of scholarly work parts of which will be discussed in detail during the discussion of New Zealand's tort.

Suffice to say at this point that all critics are united probably in only one respect – in identifying the inappropriateness of Prosser's approach. His views nevertheless truculently prevailed. It seems important to note that Prosser characterised himself as a 'packrat' who was 'at best a collector; and the most that can ever be said for him is that he sometimes chooses well.'²⁶⁹ As regards his pre-eminence Prosser has done sterling work. If so, why all this criticism? Gavison has suggested that he was a scholar who started 'from decisions without an external concept of privacy' and was 'led to rely on the concept that may be derived from the decisions themselves.'²⁷⁰ Prosser was nonetheless regarded as such a pivotal figure that his 'capacity for synthesis had become a capacity to create doctrine.'²⁷¹ It is thus tempting to think (and many have succumbed) that the privacy torts were Prosser's own invention.²⁷² As one scholar observed with regard to the legal analysis of the courts, 'judicial analysis of the issue of intrusions [into privacy] in public places seldom progresses beyond rote recitation of [Prosser's]

ries: A Focus on Remedy' (1985) 73 *California Law Review* 772, 842. Compare *Doe v Methodist Hospital*, 690 NE 2d 681, 686 (1997).

²⁶⁸ Eg, E W Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962, 970-1. This was also Warren and Brandeis' original intention - 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 197; see also D W Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769, 778.

²⁶⁹ G E White, *Tort Law in America: An intellectual History* (expanded ed, 2003) 176 (internal citation omitted); see also G Joyce, 'Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy' (Book review) (1986) 39 *Vanderbilt Law Review* 851, 859.

²⁷⁰ R Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Review* 421, 460; see also G Joyce, 'Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy' (Book review) (1986) 39 *Vanderbilt Law Review* 851, 862.

²⁷¹ See G E White, *Tort Law in America: An intellectual History* (expanded ed, 2003) 176; A J McClurg, 'Kiss and Tell: Protecting Intimate Relationship Privacy through Implied Contracts of Confidentiality' (2006) 74 *University of Cincinnati Law Review* 887, 897 (Prosser 'succeeded in getting his fairly narrow views about privacy etched deeply and permanently into law' – internal citation omitted).

²⁷² A L Peikoff, 'The Right to Privacy: Contemporary Reductionists and their Critics' (2006) 13 *Virginia Journal of Social Policy and the Law* 474, 493; see also S K Sandeen, 'Relative Privacy: What Privacy Advocates Can Learn From Trade Secret Law' [2006] *Michigan State Law Review* 667, 690; G Joyce, 'Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy' (Book review) (1986) 39 *Vanderbilt Law Review* 851, 861. For a similar suggestion regarding the 'false light' branch of the tort see J Clark Kelso, 'False Light Privacy: A Requiem' (1992) 32 *Santa Clara Law Review* 783, 788-9.

observations.’²⁷³ Since Prosser has supposedly not analysed anything and the courts in turn routinely ‘analyse’ nothing but his observations, virtually no analysis of the private facts tort took or takes place outside academic circles.²⁷⁴ At first blush, such an approach appears to have turned clairvoyance successfully into firmly established common law. By continuously repeating Prosser’s findings, a jurisdiction can surely collect an impressive amount of experience.²⁷⁵ On the other hand, this might also be a delicious recipe for entrenching a wholly dysfunctional tort.

Notwithstanding, to this writer it seems almost too obvious to need mentioning that ‘synthesis’ alone rather than analysis of the underlying legal problems does not suffice to mould a cause of action. It occurs to me that regarding Prosser merely as the tort’s midwife (by means of evaluating 300 cases) would not capture the whole picture. As we will see later, Prosser’s view on the nature and function of tort law in general might well have influenced what he chose as appropriate means to fashion the public dissemination tort in particular.²⁷⁶ In other words, since the tort is largely Prosser’s own invention and therefore akin to a ‘one-man-project’ it seems rather likely that not only his syntheses hardened into doctrine, but that his general tort doctrine hardened as doctrine of the privacy torts. Prosser tried to tidy up the body of law loosely evolving under the privacy banner. Such a process, however, is unlikely to begin without a ‘tidy’ picture in mind.²⁷⁷ This picture is, thus, what we will attempt to fathom in the following. Prosser’s view on torts was largely Holmesian, which is why we also meet our ‘devil incarnate’ again. Although it goes without saying that *ad hominem* arguments are inappropriate, the views of those two scholars have been particularly influential for the de-

²⁷³ A J McClurg, ‘Bringing Privacy out of the Closet: A Tort Theory for Intrusions in Public Places’ (1995) 73 *North Carolina Law Review* 989, 1036.

²⁷⁴ See also L M Jennings, ‘Paying the Price for Privacy: Using the Private Facts Tort to Control Social Security Number Dissemination and the Risk of Identity Theft’ (2004) 43 *Washburn Law Journal* 725, 731.

²⁷⁵ This experience impressed particularly Keith J - *Hosking* [2005] 1 NZLR 1 (CA) para 210.

²⁷⁶ See also G E White, *Tort Law in America: An intellectual History* (expanded ed, 2003) 162 – White notes that Prosser’s findings were not supported merely by generalisations made in the text; see too J Clark Kelso, ‘False Light Privacy: A Requiem’ (1992) 32 *Santa Clara Law Review* 783, 789; G Joyce, ‘Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy’ (Book review) (1986) 39 *Vanderbilt Law Review* 851, 859 who indicates that Prosser’s self-styled ‘pack-rat’ image ‘is one of the great understatements in all legal writing.’

²⁷⁷ See generally W N R Lucy, *Philosophy of Private Law* (2007) 214.

velopment of the US public disclosure tort.²⁷⁸ We must therefore pay close attention to them.

As for the gist of the action, Prosser's protected interest (reputation with overtones of emotional distress) seems too narrow. As this thesis proceeds on the assumption that the chosen 'wrong' or 'gist' - if it matters at all - has a bearing on the means to protect this interest, this could well have consequences for the structure of the tort. But let us now turn to the elements of the tort as established by Prosser. Although the two articles of Prosser and Warren and Brandeis are usually mentioned all in the same breath in treatises concerned with the privacy torts, only the former matters for contemporary purposes. The original conception of the latter has been wholly replaced in favour of Prosser's and Holmes' views as we will see next.

2.3 The private facts test

As one scholar remarks with regard to the tort's initial private facts test, '[t]he inherent confusion in the public disclosure tort is evidenced by the inconsistent facts which courts have defined as private.'²⁷⁹ The courts have been reluctant to define private facts particularly due to the perilous intimidation of conflicting First Amendment interests.²⁸⁰ It is nonetheless plain that matters taken from public records enjoy absolute protection since *Cox Broadcasting Co v Cohn*; 'private facts' cannot be established under these circumstances.²⁸¹ Social values other than the public availability of 'public records' are thus irrelevant; any information contained in a public record may be disseminated even if it consists of unproven coarse innuendo dating from several decades

²⁷⁸ Clark Kelso has argued that Prosser had a special talent to identify general trends in tort law - 'False Light Privacy: A Requiem' (1992) 32 *Santa Clara Law Review* 783, 788. This implies, however, that his views were widely accepted.

²⁷⁹ G Dendy, 'The Newsworthiness Defense to the Public Disclosure Tort' (1997) 85 *Kentucky Law Journal* 147, 150-151; see also S M Scott, 'The Hidden First Amendment Values of Privacy' (1996) 71 *Washington Law Review* 683, 689.

²⁸⁰ C Hart, 'Y.G. v Jewish Hospital of St. Louis: Breathing Life into the "Disclosure of Private Facts" Tort' (1991) 35 *Saint Louis University Law Journal* 931, 939; see also B C Murchison, 'Revisiting the American action for public disclosure of private facts' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 32, 38.

²⁸¹ *Romaine v Kallinger*, 537 A 2d 284, 298 (1988); *Cumrine v Harte-Hanks Television*, 37 SW 3d 124, 127 (2001); *Hogan v Hearst Corp*, 945 SW 2d 246, 250 (1995); *Uranga v Federated Publications Inc*, 67 P 3d 29, 33 (2003). For a brief critique see also S Ingber, 'Rethinking Intangible Injuries: A Focus on Remedy' (1985) 73 *California Law Review* 772, 848-9. It should be noted that, for instance, Ohio's juvenile court records are not public records in this sense - *Roe v Heap*, (2004) Westlaw 1109849 para 78.

ago.²⁸² McNulty characterises this absolute privilege as a ‘hard and fast rule of no liability [that] fosters predictability of result and certainty of expectation.’²⁸³

Apart from absolutely privileged public records, ‘family matters, health problems, and sex lives’ are ‘clearly private.’²⁸⁴ We can see similar types of personal information emerging as ‘obviously private’ in England and Wales and in perhaps more evocative terms as ‘privacy paradigm’ in New Zealand. Particularly as regards the example of public records, however, it has to be added that this would not explain the confusion about the ‘private facts’ test in the USA. Rather a generally overpowering impact stemming from the blurred ‘line between public and private life’²⁸⁵ has to be noted. Once matters occur in public places,²⁸⁶ plaintiffs’ fortunes take quite a bit of a tumble.

In the following, I attempt to dissect particularly this phenomenon and thereby hope to shed light on the protection of privacy interests in the USA generally. The lack of protection in public places, as I will argue, stems (1) superficially in terms of adjudication technique from a formalistic application of the private facts test; and (2) in terms of tort theory, from the absence of anything in the near vicinity of either a concept of right or genuine duty observed from an ‘internal point of view.’²⁸⁷ The theory underlying the US tort law regards tort as being comprised of strict ‘liability rules’ ordered by

²⁸² *Uranga v Federated Publications Inc*, 67 P 3d 29, 35 (2003) - the defendant newspaper reproduced a ‘handwritten, one-page, unsworn statement’ containing homosexual innuendo concerned with oral sex from a more than 40 year old court file. The Supreme Court of Idaho held that there ‘is no indication that the First Amendment provides less protection to historians than to those reporting current events. No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the *timeliness* and *importance* of the *ideas* seeking expression’ (emphasis added; internal citation omitted). See also *Romaine v Kallinger*, 537 A 2d 284, 299 (1988).

²⁸³ P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 103.

²⁸⁴ Eg, *Johnson v K Mart Corp*, 723 NE 2d 1192, 1197 (2000); *Alvarado v KOB-TV LLC*, (2007) Westlaw 2019752 at p 5; § 652 D comment b Restatement (Second) of Torts (1977); J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ (1996) 55 *Maryland Law Review* 425, 439.

²⁸⁵ *Shulman v Group W Production Inc*, 18 Cal 4th 200, 207 (1998); R A Smolla, ‘Privacy and the First Amendment Right to Gather News’ (1999) 67 *George Washington Law Review* 1097, 1098.

²⁸⁶ In US law, a public place ‘includes anywhere that is visible from a publicly accessible vantage point’ - E Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50 *University of Toronto Law Journal* 305, 322.

²⁸⁷ See also G P Fletcher, ‘Fairness and Utility in Tort Theory’ (1972) 85 *Harvard Law Review* 537, 556 who argues that there are ‘two radically different paradigms for analysing tort liability’; methods of analysis include ‘the appropriate style of legal reasoning, and [...] the relationship between the resolution of individual disputes and the community’s welfare.’

judges from an ‘external point of view,’ which is a matter of social engineering. As will presently appear, the ‘right to privacy’ which might have afforded recognition of individual interests - as originally proposed by Warren and Brandeis - ceased to exist if ceased is the word. Furthermore, even the correlation between the defendant’s conduct and harm done to plaintiff remains to a large extent unexamined by the courts. The same holds true for disputed material in the category of ‘clearly private’ information in the aforementioned sense.

Building upon the joint judgment’s unfounded rejection of a rights-based approach in *Hosking*, we will proceed by proposing an alternative view based on a ‘right to privacy.’ This analysis will in turn prepare the ground for supporting Tipping J’s distinct approach.

2.3.1 Adjudication technique

By turning first to the adjudication technique of the courts, we will loosely speaking return to the non-pejorative term ‘legal positivism,’ which some scholars have associated with Holmes.²⁸⁸ Whilst English law has seen a distinguished line of positivistic jurists, most leading English positivists have been moralists and did not distinguish ‘is’ and ‘ought’ in law out of scepticism or cynicism as Holmes arguably did.²⁸⁹ It should be reiterated that Holmes was clearly influenced by early utilitarian thinkers, but his legal theory is more appropriately addressed as ‘legal realism’ or ‘pragmatic instrumentalism.’²⁹⁰ Nowadays, the US courts have apparently cultivated what H L A Hart has addressed as ‘slot machine’ adjudication under the headline of ‘formalism.’²⁹¹ What he meant by that was the inappropriateness of interpreting a legal term of art in a manner ‘which is blind to social values and consequences’ and therefore neglects what he

²⁸⁸ T A Reed, ‘Holmes and the Paths of the Law’ (1993) 37 *American Journal of Legal History* 273, 279.

²⁸⁹ W Twining, ‘Other People’s Power: The Bad Man and English Positivism, 1897-1997’ (1997) 63 *Brooklyn Law Review* 189, 196.

²⁹⁰ R S Summers, ‘On Identifying and Reconstructing a General Legal Theory – Some Thoughts Prompted by Professor Moore’s Critique’ (1984) 69 *Cornell Law Review* 1014, 1014-20.

²⁹¹ H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 610 (internal citation omitted). Hart, however, seems to be rather adverse to such stigmatisations. These terms stem from the so-called “Realists” who criticised the judicial process in the USA, because the ‘courts make an excessive use of logic, [and] take a thing to “a dryly logical extreme”’ – at p 610 (internal citation omitted). Hart claims, convincingly, that criticisms of these “Realists” have in fact nothing to do with logic. See S E Herget and S Wallace, ‘The German Free Law Movement as the Source of American Legal Realism’ (1987) 73 *Virginia Law Review* 399 (1987) for a brief overview.

described as ‘penumbral area[s]’ within which the judge necessarily has to legislate.²⁹² Even though Hart seems first and foremost concerned with the interpretation of legislation, he stresses that penumbral decisions are not about judicial legislation.²⁹³ It should be noted, although only in passing, that British positivistic theory is predominantly aimed at general jurisprudence rather than ‘a theory of common law adjudication.’²⁹⁴ The difference is nevertheless not so much one between ‘law as it is’ and ‘law as it ought to be’ in a positivistic sense as defended by Hart; it is rather one between an ‘intelligent decision’ guided by various social aims (not necessarily propelled by morality) and one that is merely an ‘automatic’ or ‘mechanic’ form of quintessentially deductive reasoning.²⁹⁵ In short, what seems to be required instead is a ‘value judgment’²⁹⁶ as sketched in New Zealand by Tipping J in *Hosking*.²⁹⁷

With regard to the reasoning of the US courts on the ‘private facts’ test it has to be noted that the notion of penumbral areas between public and private seems to be largely unknown.²⁹⁸ We will see later on, however, that the formalistic reasoning of judges correlates with a tort theory strongly striving for predictability. In this respect, formalism should not be understood pejoratively; formalism is rather a means to achieve certain ends in law.²⁹⁹ In this context, predictability of decisions (as an example

²⁹² Ibid, at p 610-1; see also H L A Hart, *The Concept of Law* (Clarendon 2nd ed, 1994) 204.

²⁹³ Ibid, at p 612.

²⁹⁴ W Twining, ‘Other People’s Power: The Bad Man and English Positivism, 1897-1997’ (1997) 63 *Brooklyn Law Review* 189, 196-7 (1997).

²⁹⁵ H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 614. On formalism see generally E W Thomas, *The Judicial Process* (2005) particularly at pp 55, 57; A J Sebok, ‘Misunderstanding Positivism’ (1995) 93 *Michigan Law Review* 2054, 2076.

²⁹⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 250 per Tipping J; see also M Waterfield, ‘Now You See It, Now You Don’t: the Case for a Tort of Infringement of Privacy in New Zealand’ (2004) 10 *Canterbury Law Review* 182, 186. Hart seems to use the phrase ‘value statement’ in a similar way – see H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 625.

²⁹⁷ For the recognition of ‘social aims and consequences’ see *Hosking* [2005] 1 NZLR 1 (CA) para 239. For a similar view see also S M Scott, ‘The Hidden First Amendment Values of Privacy’ (1996) 71 *Washington Law Review* 683, 712.

²⁹⁸ It should be reiterated that the courts are anxious to define ‘private facts’ because of a possible intimidation of freedom of speech. One may thus argue - analogous to Hart - that the decisions represent a ‘determined choice’ in order to protect freedom of speech as a ‘social aim’, a matter to which we will return - see H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 611. Notwithstanding, there is a difference between a judgment that states something ‘is a private fact but newsworthy’ and a judgment which rules that something ‘is not a private fact in the first place.’ It is the very purpose of this tort to delimit free speech interests. Assuming that *any* consideration concerning the privacy side of the conflict would be impossible without paying attention to free speech interests, the whole tort seems quite pointless.

²⁹⁹ See R S Summers, ‘How Law is Formal and Why it Matters’ (1997) 82 *Cornell Law Review* 1165,

of such an end) may well be the driving force behind formalistic reasoning. Switching to the more mundane, probably even sordid reality, *Shulman v Group W Productions* as a case of fairly recent date will give eloquent testimony to this proposition.

The two plaintiffs, private persons as distinct from public or involuntary public figures,³⁰⁰ were trapped in their car after being involved in an accident. The rescue team was accompanied by a 'ride-along' camera operator working for the defendant, a television programme producer. The corporation was gathering material for the 'reality-TV' format *On Scene: Emergency Response*. The camera operator filmed the plaintiffs' extrication from the vehicle and the efforts of the medical team to provide care.³⁰¹ The Court was genteelly discreet, however, about the injuries suffered particularly by one plaintiff who was left a paraplegic by the accident.³⁰² It may set one wondering though, in which state a patient might be who utters 'this is terrible, am I dreaming?', 'I just want to die' or 'I just want to die [...] I don't want to go through this.'³⁰³

Courts, of course, merely state facts of the case that matter with regard to their following legal reasoning. We will now see that the US tort usually protects abstract places, not plaintiffs, and thus their interest in privacy. The Court of Appeal ruled as follows:

Appellants' accident occurred on a heavily travelled public highway [...]. The videotape itself shows a crowd of onlookers peering down at the rescue scene below. Appellants could be seen and heard by anyone at the accident site itself and could not have had a *reasonable expectation of privacy* at the scene in regard to what they did or said. Their statements or exclamations could be freely heard by all who passed by and were *thus public, not private*.³⁰⁴

1167.

³⁰⁰ With the dissolution of the distinction between public and private spheres, the distinction between private and public figures has apparently vanished, too - R A Smolla, 'Privacy and the First Amendment Right to Gather News' (1999) 67 *George Washington Law Review* 1097, 1098.

³⁰¹ See for all above mentioned facts of the case *Shulman v Group W Production Inc*, 18 Cal 4th 200, 209 (1998).

³⁰² This plaintiff was 'critically injured'; '[b]lood, bare parts of her body distorted by injury [...] [were] visible' - A J McClurg, 'Bringing Privacy Law Out of The Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *North Carolina Law Review* 989, 995.

³⁰³ *Shulman v Group W Production Inc*, 18 Cal 4th 200, 211 (1998).

³⁰⁴ *Ibid*, at p 213.

Once the plaintiffs were brought into the helicopter, however, they enjoyed a reasonable expectation of privacy from being surreptitiously filmed because they were located in a ‘private space.’³⁰⁵ The broadcast was nevertheless deemed newsworthy, a matter to which we will return.³⁰⁶

The stoic delight with which the courts address the possibility of maintaining privacy in public places can be found already in Prosser’s work. Photographing a person in public, Prosser opined, does not constitute a privacy violation ‘since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.’³⁰⁷ This observation, by way of illustration, is blind to the social consequence of Hart’s ‘slot machine adjudication’ that photographs are a particularly intrusive permanent record and could be disseminated more broadly than the original observation.³⁰⁸ As for the consequences and thus intrusiveness of ‘reality-TV’ and ride-along journalism, even photographs of accident scenes very rarely say ‘I just want to die’ out loud. In *Shulman*, it may not have been self-evident why a group of persons looking at an accident scene should determine whether or not an individual plaintiff has a ‘reasonable expectation of privacy.’ The supposed decisiveness of the implication that the rescue team (including a nurse wear-

³⁰⁵ Ibid.

³⁰⁶ Note that the Supreme Court of California concentrated on the newsworthiness element as far as the public disclosure tort was concerned.

³⁰⁷ W L Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383, 391-92; see also A J Lum, ‘Don’t Smile, Your Image Has Just Been Recorded on a Camera-Phone: The Need for Privacy in the Public Sphere’ (2005) 27 *University of Hawaii Law Review* 377, 411. Reasonably well known is the passage stating that ‘merely because a fact is one that occurred at a public place and in the view of the general public, which may have been only a few persons or merely because it can be found in the public record, does not mean that it should receive widespread publicity if it does not involve a matter of public concern’ - W P Keeton (ed), *Prosser and Keeton on Torts* (5th ed, 1984) 858. In the USA at least, this statement is to my knowledge not reflected in the decisions of the courts.

³⁰⁸ See D M Worley, ‘Shulman v Group W Productions: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity’ (1999-2000) 27 *Western State University Law Review* 535, 541; N A Moreham, ‘Privacy in Public Places’ (2006) 65(3) *Cambridge Law Journal* 606, 618. For further ‘social consequences’ see also E Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50 *University of Toronto Law Journal* 305, 327-8; P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 102; A J Lum, ‘Don’t Smile, Your Image Has Just Been Recorded On A Camera-Phone: The Need For Privacy In The Public Sphere’ (2005) 27 *University of Hawaii Law Review* 377, 411-2; L E Rothenberg, ‘Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space’ (2000) 49 *American University Law Review* 1127, 1157; K M. Beasley, ‘Up-Skirt and other Dirt: Why Cell Phone Cameras and other Technologies Require a New Approach to Protecting Personal Privacy in Public Places’ (2006) 31 *Southern Illinois University Law Journal* 69, 81-2.

ing ‘a small microphone’³⁰⁹) at the accident site itself witnessed the spectacle³¹⁰ may or may not be regarded as bordering upon the absurd.³¹¹ Assuming that this would constitute a veritable argument, the media defendant could not only determine the ‘newsworthiness’ of the facts but also turn ‘private facts’ into non-actionable ‘public facts’ merely by joining a cooperative medical team. The Court’s initial argumentation implying that those driving on the ‘heavily travelled public highway’ might have seen or heard anything from the ‘rescue scene below’ (the car fell down an embankment)³¹² is therefore the most honest one.³¹³ It indicates that it is not necessary that somebody has actually seen the incident; it is rather determinative that anybody could have seen the incident hypothetically because of the location’s nature. In brief, the reasoning of the court is rather an embellishment of an already fixed outcome.³¹⁴

Law has to be seen in its context however. In defence of the US approach it should hence be noted that *Shulman* shows a vivid manifestation of the demand for ‘exposure out of a combination of voyeurism, desire for emotional connection, [and] democratic suspicion that reticence is a sign of elitism’ which Rosen certainly had in mind when he addressed the framework of a so-called market democracy.³¹⁵ As we will see

³⁰⁹ *Shulman v Group W Production Inc*, 18 Cal 4th 200, 209 (1998).

³¹⁰ An early concern of privacy scholars was that what was at issue was ‘the debasement of his sense of himself as a person that results because [an individual’s] life has become a public spectacle against his will. There is anguish and mortification, a blow to human dignity, in having the world intrude as an unwanted witness to private tragedy’ - E J Bloustein, ‘Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional as Well?’ (1968) 46 *Texas Law Review* 611, 619. Cases such as *Shulman* particularly show how right he was.

³¹¹ A similar (abstract) criticism of legal formalism could be found in E W Thomas, *The Judicial Process* (2005) 55, who observes that even today ‘absurd’ judicial decisions are regarded as legally sound. See also C R Sunstein, ‘On Analogical Reasoning’ (1993) 106 *Harvard Law Review* 741, 749.

³¹² According to A J McClurg, the car ‘plunge[d] one hundred feet and overturn[ed]’ - ‘Bringing Privacy Law Out of The Closet: A Tort Theory of Liability for Intrusions in Public Places’ (1995) 73 *North Carolina Law Review* 989, 994 (1995).

³¹³ The Californian Supreme Court questioned the reasoning of the Court of Appeal during the discussion of the intrusion tort - *Shulman v Group W Production Inc*, 18 Cal 4th 200, 233 (1998).

³¹⁴ See also J Siprut, ‘Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places’ (2006) 33 *Pepperdine Law Review* 311, 319 who argues that the courts regard events taking place in public as ‘by definition not private’; S M Scott, ‘The Hidden First Amendment Values of Privacy’ (1996) 71 *Washington Law Review* 683, 689.

³¹⁵ J Rosen, ‘Continental Divide’ [2004] *Legal Affairs* 49, 53; for growing voyeuristic tendencies see also A Allen, ‘Coercing Privacy’ (1999) 40 *William and Mary Law Review* 723, 737-8; J Siprut, ‘Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places’ (2006) 33 *Pepperdine Law Review* 311, 320-1. It is not without reason that other scholars insist on privacy protection beyond the reach of market forces – see, eg, J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 373. This is possible, according to Kahn, by grounding privacy in human dignity – see *ibid*, at p 383. Since ‘dignity’ is not a value that is either

later, the theoretical approach on torts taken in that country likewise appeals to ‘a distinctively American style of individualist ideology.’³¹⁶ In a sense, the law suits the society that it is supposed to serve perfectly well.³¹⁷ The notion of a ‘Continental Divide’ is nonetheless misplaced;³¹⁸ at issue are rather distinct functions of freedom of speech in respective societal and constitutional contexts.³¹⁹

In sum, social consequences of any kind which we have associated with ‘intelligent decisions’ do not play any role; the US courts rather decide ‘automatically’ or ‘mechanically.’³²⁰ Hence, many judges dismiss privacy claims by using these hackneyed phrases contending that a matter cannot be private because it occurred in a public place.³²¹ Likewise, the notion of ‘public places’ is occasionally also equated with per-

protected or likely to be protected in the USA, a theoretical solution will most likely be based on economic considerations – see J Siprut, at p 322-3 for a suggestion to this effect.

³¹⁶ P Cane, ‘The Anatomy of Private Law Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 203, 204 citing N Duxbury, *Patterns of American Jurisprudence* (1995) 418. See also A Taslitz, ‘The Fourth Amendment in the Twenty-First Century: Technology, Privacy and Human Emotions’ (2002) 65 *Law and Contemporary Problems* 125, 172-3.

³¹⁷ Bloustein noted early on that the identification of individuals in generally ‘newsworthy’ articles merely ‘pandered to the public taste for emotional colo[u]r, gossip, and sensation without serving in the least to inform the public of any matter of public concern’ - ‘Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional as Well?’ (1968) 46 *Texas Law Review* 611, 623.

³¹⁸ Democracy, equality etc are of course malleable concepts. It should be stressed that the USA is a diverse country in many ways. There is (certainly among others) a group of scholars calling themselves ‘Brennan liberals.’ These scholars seem to regard the constitutionalisation of the common law, for instance, in South Africa, as a democratisation of the law that would be a desirable yet impossible development in their country - see for such a view, eg, F I Michelman, ‘The Bill of Rights, the Common Law, and the Freedom-Friendly State’ (2003) 58 *University of Miami Law Review* 401, 416.

³¹⁹ In the Canadian context free speech is ‘one of a group of rights that together create the fabric of freedom and democracy for a multicultural, pluralistic and tolerant society’ – see L Weinrib, comment in G Nolte (ed), *European and US Constitutionalism* (2005) 74 as cited in D Halberstam, ‘Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights’ (2007) 5 *International Journal of Constitutional Law* 166, 178.

³²⁰ An anticipated criticism would probably point to *Daily Times Democrat v Graham*, 162 So 2d 474 (1964). In that case, the defendant was photographed in a public place while her skirt was blown up. The court upheld her claim because of an ‘indecent and vulgar intrusion’ into the privacy interest. What is more, the Court opined that ‘a purely mechanical application of legal principles should not be permitted to create an illogical conclusion’ - at p 478 (emphasis added)). That the photograph was deemed vulgar and indecent in *Daily Times Democrat* (decided a mere fortnight after *New York Times v Sullivan*) seems to be an exception - see, eg, *McNamara v Freedom Newspapers Inc*, 802 SW 2d 901, 905 (1991); *Barnhart v Paisano Publications LLC*, 457 F Supp 2d 590, 593 (2006).

³²¹ See, eg, *Richard v Wal-Mart Stores Inc*, (2007) Westlaw 1521467 at p 3; *Barnhart v Paisano Publications, LLC*, 457 F Supp 2d 590, 593 (2006); *Mayall v Dennis Stuff Inc*, (2002) Westlaw 32113761 at p 2; *Furman v Sheppard*, 744 A.2d 583, 586 (2000); *American Broadcasting Companies Inc v Gill*, 6 SW 3d 19, 28 (1999); *Reeves v Fox Television Network*, 983 F Supp 703, 709 (1997); *Solomon v National Inquirer Inc*, (1996) Westlaw 635384 at p 4; *McNamara v Freedom Newspapers Inc*, 802 SW 2d 901, 902 (1991); *Batts v City of Baton Rouge*, 501 So 2d 302, 304 (1987); *Benally v Hundreds Arrow Press Inc*, 614 F Supp 969, 981 (1985); *Jaubert v Crowley Post-Signal Inc*, 375 So 2d 1386, 1391 (1979).

sonal information already being in the ‘public domain’ which is not actionable per se.³²² Thus, a positivist such as H L A Hart would perhaps conclude, ‘[d]ecisions made in a fashion as blind as this [...] scarcely deserve the name of decisions; we might as well toss a penny in applying a rule of law.’³²³

An Australian case broke through the shackles and may point the way ahead for jurisdictions outside the USA. Cleeson CJ famously held that there is ‘a large area in between what is necessarily public and what is necessarily private.’³²⁴ Such a statement calls for the recognition and exploration of ‘penumbral areas’, not necessarily larger than Hart would allow,³²⁵ but within which the judge has to ‘legislate.’ Incidentally, the same phenomenon and problem occurs with regard to freedom of speech given that speech is classed into categories such as ‘commercial speech.’³²⁶ That this is emphasised as a privacy problem seems unjustified.³²⁷ Hence, it is advantageous to acknowledge that judges ‘make’ or discover ‘law endlessly’ anyway.³²⁸

2.3.2 Litigant’s right and court’s permission

Being confronted with a ruling such as *Shulman* one may wonder what law actually is.³²⁹ At the outset, we have already noted that, *inter alia*, health problems are

³²² See *White v Township of Winthrop*, 116 P 3d 1034, 1037 (2005); see also P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 102.

³²³ H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 611.

³²⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226 (HC); for examples of ‘intelligent decisions’ see *Andrews v TVNZ* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 29 (New Zealand); *Campbell v MGN* [2004] 2 All ER 995 (HL) para 72 per Lord Hoffmann (UK) (“Campbell”).

³²⁵ See H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 614 (‘[...] to insist on the utilitarian distinction is to emphasise that the hard core of settled meaning is law in some centrally important sense and that even if there are borderlines, there must be first lines’).

³²⁶ M Hertig Randall, ‘Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?’ (2006) 6 *Human Rights Law Review* 53, 57.

³²⁷ See, eg, J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 391 citing *R v Broadcasting Complaints Commission, ex parte BBC* [2001] QB 885, 892 as saying, ‘[w]e are here in an area [ie privacy] involving open textured concepts.’ There is, in the author’s view, nothing new or unusual about it – see H L A Hart *The Concept of Law* (Clarendon 2nd ed, 1994) 124 for a general discussion.

³²⁸ See E W Thomas, *The Judicial Process* (2005) 3-4. See also *Lai v Chamberlains* [2006] NZSC 70 para 57 per Tipping J and generally S Coyle, ‘Positivism, Idealism and the Rule of Law’ (2006) 26 *Oxford Journal of Legal Studies* 257, 272. .

³²⁹ H L A Hart, *The Concept of Law* (Clarendon 2nd ed, 1994) 1.

routinely regarded as ‘clearly private’ matters in the USA.³³⁰ As soon as matters occur in a public place, however, it is not even worthwhile considering the important issues the tort is supposedly meant to protect from dissemination. A mainland European, by contrast, is used to being entitled to certain rights protecting his or her individual interests. In this context, for example, a right to privacy would rather unpretentiously suggest that a substantial health issue has at least a bearing on the court’s decision. In *Shulman* on the other hand, it was only after the plaintiffs were brought into the rescue helicopter that they enjoyed a reasonable expectation of privacy. This expectation was nevertheless not ‘reasonable’ because of respect for clearly private matters, but because they were transferred to a ‘private space’ (the helicopter), which was deemed analogous ‘to a hospital room.’³³¹ In this respect, some may take umbrage particularly at the actuality that individual interests do not seem to be relevant at all – this does not fit the notion of a ‘right’ in its broadest sense.

Those, however, who are most indignant about invoking the notion of rights in the present context at all, may perhaps acknowledge that the interaction or relationship of the litigants plays barely any role in such reasoning. Instead, the judgment is wholly made by reference to ‘external factors.’ A yardstick as to how the defendant has to conduct herself (perhaps in terms of blameworthiness or wrongful conduct) is difficult to identify given that ‘private facts’ of the plaintiff were gathered in a public place. The location alone seems to give the defendant carte blanche regardless of other circumstances and considerations such as intentions, motives, consequences etc. In other words, what may be described as ‘internal factors’ are not assessed by the courts.

³³⁰ The information involved in *Shulman* does furthermore without much ado qualify as ‘humiliating illness’ in terms of § 652 D comment (b) of the Restatement (Second) of Torts.

³³¹ *Shulman v Group W Production Inc*, 18 Cal 4th 200, 213 (1998). For a brief discussion of this analogy see R A Smolla, ‘Privacy and the First Amendment Right to Gather News’ (1999) 67 *George Washington Law Review* 1097, 1119-20. Smolla asks, for instance, ‘[d]oes it matter whether the door to the ambulance or helicopter is open or shut?’ – at p 1120. For similar argumentation see *Daly v Viacom Inc*, 238 F Supp 2d 1118, 1125 fn 3 (2002).

What may be the reason? Current explanations for the lack of privacy protection in public places suggest a ‘fallacious view of privacy as an all-or-nothing concept’³³² or that courts conceptualise ‘privacy as a form of secrecy.’³³³ While these observations are appealing, we will attempt to develop a more general and thus further reaching approach predominantly grounded in tort theory.³³⁴ In the following I hope to show that, *inter alia*, this phenomenon does not necessarily have anything to do with particular concepts of privacy.³³⁵ By referring to tort theory instead, I mean that the purpose and therefore the nature and function of US tort law in general may contribute to a proper understanding of at least some of the privacy tort’s elements in particular. Tort theory has generally seen a revived interest since the 1990s. It is nevertheless important to note that I by no means adopt a particular tort theory - my leitmotiv is rather ensuring consistency particularly with the NZBoRA. Tort law theories usually presuppose (and try to elaborate) the distinctive normative foundation of private law.³³⁶ The constitutionalisation of the common law, in contrast, links a tort closely to a human rights instrument. The latter is rather the domain of constitutional theory. Such a process involves importing elements of public law into the private law sphere. For the purposes of a constitutionalised tort, we must therefore try to blend both strands of theory in a compelling manner. As for English law, we will see that a tort theory based on a ‘mixed conception of corrective justice’ might harmonise well with a theory conceptualising constitutional rights as principles. The result, as it were, incidentally seems compatible with such a tort theory. Theoretical aspects aside, this approach might also be rewarding because it is possible to canvass some basic differences between the US system on one hand and the systems of New Zealand and the UK on the other.

³³² E Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50 *University of Toronto Law Journal* 305, 322; A J McClurg, ‘Bringing Privacy out of the Closet: A Tort Theory for Intrusions in Public Places’ (1995) 73 *North Carolina Law Review* 989, 1041.

³³³ D J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1147; a similar explanation was given by J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ (1996) 55 *Maryland Law Review* 425, 441.

³³⁴ This approach therefore follows the assumption that ‘[l]aw fuses theory and practice’ - E J Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, 486. Weinrib also argues that every development in tort law ‘implies a theory of tort law.’

³³⁵ See also J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ (1996) 55 *Maryland Law Review* 425, 437 (‘Publicizing facts that already appear in some zone of the public does not give rise to liability under the disclosure tort, even if the facts are “private by nature”’).

³³⁶ See W N R Lucy, *Philosophy of Private Law* (2007) 419-20.

2.3.2.1 *The status of privacy and freedom of speech*

In order to protect privacy legally, the first question to be asked in each jurisdiction should be concerned with the status of privacy.³³⁷ Is the status of privacy in law that of a right, value, principle, or social policy? This status may of course differ from jurisdiction to jurisdiction which could also show in the decisions reached.³³⁸ Pedantic as it might sound, legal systems such as those involved here can surely be *compared*, but single decisions are not necessarily *comparable* in a narrow sense because of different preconditions regarding the standing of the conflicting values. A subsequent second question is concerned with elaborating characteristics of privacy in order to form its legal contents.³³⁹ In the context of informational privacy, these characteristics may include, for instance, the already familiar ‘clearly private’ matters such as health problems or information related to one’s sexuality.

As for US tort law, the protection of the privacy interest is peculiar inasmuch as it is generally spoken of in terms of a right rather than being characterised by the defendant’s conduct.³⁴⁰ A right *to* privacy would usually afford some protection to the characteristics *of* privacy however. It has already been suggested that the decisions of the US courts do not sit comfortably on the notion of rights. The initial observation therefore seems to be obfuscated by the fact that the label ‘right to privacy’ does not necessarily have to mean anything. As regards US law, one may thus argue that some ‘characteristics’ of privacy have been ascertained whilst their ‘status’ in law remains opaque.

³³⁷ Before Ruth Gavison starts developing her concept of privacy she asks: ‘[t]he first [question] relates to the *status* of the term: is privacy a situation, a right, a claim, a form of control, a value?’ - ‘Privacy and the Limits of Law’ (1980) 89 *Yale Law Review* 421, 424 (emphasis hers); see also *Brooker v Police* [2007] 3 NZLR 91 (SC) para 163 per Thomas J.

³³⁸ *Brooker v Police* [2007] 3 NZLR 91 (SC) para 163 per Thomas J.

³³⁹ Gavison’s convincing second question before developing her account reads: ‘[t]he second [basic question] relates to the *characteristics* of privacy: is it related to information, to autonomy, to personal identity, to physical access?’ - ‘Privacy and the Limits of Law’ (1980) 89 *Yale Law Review* 421, 424 (emphasis hers).

³⁴⁰ W Leebron, ‘The Right to Privacy’s Place in the Intellectual History of Tort Law’ (1991) 41 *Case Western Reserve Law Review* 769, 780. Both authors never equated their ‘right to privacy’ with Cooley’s ‘right to be let alone’ - R Gavison, ‘Privacy and the Limits of Law’ (1980) 89 *Yale Law Review* 421, 437 fn 48. A similar status of privacy in New Zealand has been indicated by Thomas J in *Brooker v Police* [2007] 3 NZLR 91 (SC) para 224.

However, the US law is only a means to an end in this analysis; the focus chiefly lies on the New Zealand law. Why is the status of privacy relevant particularly with regard to a constitutionalised tort? Let us elaborate this point systematically and in small steps. The plaintiffs in *Hosking* alleged at High Court level ‘an invasion of their right to privacy’; on appeal they apparently merely argued that a ‘*cause of action*’ should be recognised.³⁴¹ First, it is suggested that right and remedy can be seen as quite different matters.³⁴² The joint judgment (correctly in my opinion) pointed out that the British extended breach of confidence action reflected the impact of a rights-based approach influenced by the HRA whereas the traditional equitable remedy represents the historical approach based on wrongful conduct.³⁴³ For Britain, this indicates that the status of privacy is in a broad sense rather akin to a right whose infringement or invasion gives rise to the remedy of extended breach of confidence. We will see in due course that the implication of a right to privacy lends itself easily to a reasonable expectation of privacy even if matters occur in public places. Contrary to the situation in the USA, ‘clearly private’ matters (regarded as ‘obviously private’ in Britain) enjoy at least recognition regardless of the location. At the very least, it is clear that freedom of speech has no presumptive priority over privacy.³⁴⁴ Irrespective of the precise nature of the privacy interest, it is clear that the competing interests are equal in their status. Thus, the scales are even – something that is difficult to observe with regard to the situation in the USA.

³⁴¹ *Hosking* [2005] 1 NZLR 1 (CA); see also *Hosking* [2003] 3 NZLR 385 (HC) para 23 per Randerson J; A Geddis, ‘*Hosking v Runtig: A Privacy Tort for New Zealand*’ (2005) 13 *Tort Law Review* 5, 11.

³⁴² See *Kaye v Robertson* [1991] FSR 62, 66 (CA) per Lord Glidewell (‘It is well-known that in English law there is *no right to privacy*, and accordingly there is *no right of action* for breach of a person’s privacy’ – emphasis added); *Wainwright v Home Office* [2003] 4 All ER 969 (HL) para 31 per Lord Hoffmann (‘There seems to me a great difference between identifying *privacy as a value* which *underlies* the existence of a *rule of law* (and may *point the direction* in which the law should *develop*) and *privacy as a principle of law* in itself’ – emphasis added). Lord Justice Sedley was bolder: ‘The two first-named claimants have a legal *right* to respect for their privacy, which has been *infringed*. [...] The *circumstances of the infringement* are such that the claimants should be left to their *remedy in damages*’ - *Douglas v Hello! Ltd (No1)* [2001] 2 All ER 289 (CA) para 105 (emphasis added). See also *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, 476 per Laws J.

³⁴³ *Hosking* [2005] 1 NZLR 1 (CA) para 42; see also N A Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628, 629. Compare for an unconvincing rebuttal *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2006] EWCA Civ 1776 paras 64, 65 per Lord Phillips MR.

³⁴⁴ Eg, *Douglas v Hello! Ltd (No1)* [2001] 2 All ER 289 (CA) para 137 per Sedley LJ; *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EMLR 19 (QB) para 38 per Eady J; [2007] 3 WLR 289 (CA) para 22 per Clarke MR; *McKennitt* [2007] 3 WLR 194 (CA) para 46 per Buxton LJ.

This observation surely risks oversimplification but provides a clear basis for discussing the situation in New Zealand. New Zealand's situation is both difficult to understand and portray since influences from both British and US sources are continually mixed with one another. This is almost exclusively true with regard to the joint judgment whose approach will be considered first. As regards privacy, it is plain that their Honours implicitly rejected a rights-based approach by implementing a 'highly offensive to a reasonable person' test.³⁴⁵ The outcome closely resembled the US formulation of the tort.³⁴⁶ Their Honours nonetheless held that this development of the common law had to be consistent with the 'rights and freedoms' of the NZBoRA particularly with s 14 (freedom of speech).³⁴⁷ Given that freedom of speech is a right and privacy as a limit is not characterised – how would one reconcile both in a principled manner?³⁴⁸ In other words, how can a court reject a *rights*-based approach to privacy and still ensure consistency with the *right* to freedom of speech? What is the status of privacy in this tort then?

We will now briefly turn to Tipping J's approach. His Honour was discreet about the status of privacy in his approach and described it as a 'value or interest'³⁴⁹ or at one point as 'rule or principle.'³⁵⁰ Despite its label, the Judge nonetheless found the British extended breach of confidence action programmatically instructive.³⁵¹ However, if the British cause of action reflects in turn a 'rights-based approach', as the joint judgment rightly pointed out, how can the outcome be the same thing? As we will see later Tipping J's formulation omits a separate 'highly offensive to a reasonable person' test, which the joint judgment used to reject a rights-based approach. What, then, is the status of privacy in Tipping J's formulation?

³⁴⁵ *Hosking* [2005] 1 NZLR 1 (CA) para 125; compare M Hickford, 'A Conceptual Approach to Privacy' NZLC MP19 para 34.2.1 fn 42 who interprets their Honours' approach as a 'weaker form of right' as opposed to a 'stringent' right.

³⁴⁶ *Ibid*, para 210 per Keith J.

³⁴⁷ *Ibid*, para 111.

³⁴⁸ See also *ibid*, para 230 per Tipping J.

³⁴⁹ *Ibid*, paras 224, 225.

³⁵⁰ *Ibid*, para 253.

³⁵¹ *Ibid*, paras 247, 248.

For New Zealand courts it is of course possible to compare British and US cases freely; if it is accepted, however, that the status of privacy in the litigation of these countries differs significantly, it might be questionable whether these decisions are comparable. Let the joint judgment continue the argument with regard to the protection of personal information in public places:

[t]here is a considerable line of cases in the *United States* establishing that *generally* there is no right to privacy when a person is photographed on a public street. Cases [from the UK] such as *Peck* and perhaps *Campbell* qualify this to some extent, so that in *exceptional cases* a person might be entitled to restrain additional publicity being given to the fact that they were present on the street *in particular circumstances*.³⁵²

This is in my opinion a non sequitur. It is by no means clear why two cases from the UK, based on an equal status of privacy and freedom of speech, alter a considerable line of cases from the US based on a status of privacy that is significantly inferior to freedom of speech. We have already noted that many US courts dismiss claims mechanically regardless of ‘particular circumstances’ of the case. Hence, US courts would most likely not qualify their reasoning ‘to some extent’ if cases like *Peck* or *Campbell* were presented. Why should a New Zealand court, apart from historical reasons, be impressed by these decisions from the UK? On which basis are ‘exceptional cases’³⁵³ distinguished from ‘ordinary cases’ and why do the ‘circumstances’ contrary to the situation in the US suddenly matter at all? The joint judgment, as we will see later, most likely envisaged a so-called incremental development of the tort, *inter alia*, by reference to cases from the UK and the USA. It is nonetheless suggested that the status of privacy needs clarification.

With a fair measure of simplification, one could finally ask whether there is a right, which - if ‘wronged’ by the defendant - gives rise to a right of action as distinct from a model based on liability rules where ‘the core of *having a right* is *having a claim*

³⁵² *Hosking* [2005] 1 NZLR 1 (CA) para 164 (emphasis added); this passage was also cited in *Andrews v TVNZ* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 41.

³⁵³ ‘Exceptional circumstances’ may arise where there is a need to do justice in an individual case – E W Thomas, ‘A Return to Principle in Judicial Reasoning and an Acclamation of judicial Autonomy’ (1993) 23 *Victoria University of Wellington Law Review* Monograph 5, p 12.

for compensation if a certain kind of injury is suffered.’³⁵⁴ By and large, the distinction could be seen as one between a remedy-driven approach based on duty and a rights-based approach.³⁵⁵ The distinction between both will be further elaborated in the following.

2.3.2.2 *Ubi jus ibi remedium* - the US ‘right to privacy’ from right to duty

Thus far, we have been confronted with a confusing language concerned with rights, rules, principles, values etc. Outside the USA, this confusion is certainly a product of infusing common law methodology with ‘rights talk’ of human rights instruments. It is obvious, however, that the notion of rights is not particularly popular and often carefully eschewed. Although torts may be based on conduct rather than rights nowadays, they normally do not appear out of nowhere.³⁵⁶ The same holds true for the torts of defamation and intentional infliction of emotional harm - the two causes of action with which Prosser associated the ‘harm’ protected by his public disclosure of private facts tort.

The tort of intentional infliction of emotional harm (or *Wilkinson* principle/rule) is comparatively young.³⁵⁷ Acknowledged in 1896, the remedy was based on a ‘legal

³⁵⁴ B C Zipursky, ‘Rights, Wrongs, and Recourse in the Law of Torts’ (1998) 51 *Vanderbilt Law Review* 1, 56 - in the first case the plaintiff has suffered a ‘wrong’, ie an invasion into her right. The distinct right of action is concerned with compensation but the plaintiff may have been ‘wronged’ regardless of whether compensation is paid; E J Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, 513 who argues that if the plaintiff has no (*prima facie*) right independent of a cause of action, she rather acts as a ‘private enforcer of a public interest in wealth maximization’ and other social goals not directly related to tort law. See also W N R Lucy, *Philosophy of Private Law* (2007) 315 (‘One way in which rights can be protected is by liability rules: these protect rights by conferring a right to compensation on rights holders in the event that someone takes that to which the rights holder is entitled’ – internal citation omitted); J L Coleman and J Kraus, ‘Rethinking the Theory of Legal Rights’ (1986) 95 *Yale Law Journal* 1335, 1340. It is probably advantageous to speak of ‘putative rights holders’ in this context in order to avoid confusion with a ‘prima facie rights holder’ to which we will return in due course.

³⁵⁵ See also J Wright, *Tort Law and Human Rights* (2001) 164 (‘This case [*Kaye v Robertson*] is the classic example of the limitations to the protection of human rights in a system which has developed as system of “remedies”, rather than rights’ – emphasis added).

³⁵⁶ This notion was eloquently captured by M Richardson, ‘Privacy and Precedent: The Court of Appeal’s Decision in *Hosking v Runting*’ (2005) 11 *New Zealand Business Law Quarterly* 82; see also D Butler, ‘A Tort of Invasion of Privacy in Australia?’ (2005) 29 *Melbourne University Law Review* 339, 356-7.

³⁵⁷ In his early writings, Prosser thought, ‘if intentional infliction of emotional distress were ever to receive general recognition in the US, ‘the great majority of the privacy cases might be expected to be absorbed into it’ - internal citation omitted) - G Joyce, ‘Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy’ (Book review) (1986) 39 *Vanderbilt Law Review* 851, 861.

right to personal safety' whose infringement constituted a 'wilful injuria' by the defendant.³⁵⁸ This right which also encompassed a person's reputation seemed to be a relic of Blackstone's heyday.³⁵⁹ Defamation, on the other hand, remained in English law a strict liability tort arguably because of its origin from a right to reputation.³⁶⁰ Strict liability, at least in Europe, is seldom imposed absent an infringement of fundamental individual rights.³⁶¹

The situation is similar as regards privacy protection in the USA. Warren and Brandeis tried to influence the recognition of a fundamental right to privacy.³⁶² The violation of this general right was distinguished from the tort remedy as one of the envisaged legal responses to its infringement.³⁶³ The first case echoing Warren and Brandeis' call³⁶⁴ was *Pavesich v New England Life Ins Co*³⁶⁵. The *Pavesich*-court ac-

³⁵⁸ *Wilkinson v Downton* [1897] 2 QB 57. This right 'derives from the relationship between the body and the self' – see S J Heyman, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression' (1998) 78 *Boston University Law Review* 1275, 1319. See S Todd, 'Review: Tort' [2004] *New Zealand Law Review* 585, 602-3 for the limited importance of the rule in contemporary law.

³⁵⁹ 'The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation' – Sir W Blackstone, *Commentaries on the Laws of England* (16th ed, 1825) Book I ch 1 at p 128. Health in this context is restricted to physical harm – see *Wilkinson v Downton* [1897] 2 QB 57.

³⁶⁰ N Jansen, 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' (2004) 24 *Oxford Journal of Legal Studies* 443, 465. See also Sir W Blackstone, *Commentaries on the Laws of England* (16th ed, 1825) Book I ch 1 at p 133.

³⁶¹ *Ibid*, at p 466 (observation restricted to England, France and Germany). Whether the tort contains a fault standard is still unclear – see, eg, *Hosking* [2005] 1 NZLR 1 (CA) paras 211 and 214 per Keith J. A few US jurisdictions have employed an explicit fault standard – see, eg, *Ozer v Borquez*, 940 P 2d 371, 377 (1997).

³⁶² S D Warren and L D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 198 ('The existence of this right [to privacy] does not depend upon the particular method of expression adopted. It is immaterial [...]').

³⁶³ S D Warren and L D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 213 ('It remains to consider [...] what remedies may be granted for the enforcement of the right' – emphasis added); see also at p 219 where the authors argue that there should be a remedy in tort law available for an invasion of the right to privacy. See also *Brents v Morgan*, 299 SW 967, 971 (1927) ('We are content to hold that there is a right of privacy, and that the unwarranted invasion of such right may be made the subject of an action in tort to recover damages for such unwarranted invasion').

³⁶⁴ See W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 386; A L Peikoff, 'The Right to Privacy: Contemporary Reductionists and their Critics' (2006) 13 *Virginia Journal of Social Policy and the Law* 474; A Allen, 'Coercing Privacy' (1999) 40 *William and Mary Law Review* 723, 738.

³⁶⁵ 50 SE 68 (1905). The Supreme Court of Georgia derived a 'right of privacy' from natural law – at p 70; see also *Brents v Morgan*, 299 SW 967, 971 (1927). The right had been rejected before in *Roberson v Rochester Folding Box Co*, 64 NE 442 (1902). The recognition on a natural law basis was questioned and rejected later on by some courts – R Lisle, 'The Right of Privacy (A Contra View)' (1930) 19 *Kentucky Law Journal* 137, 142.

knowledge of a right to privacy as being embraced by a ‘right of personal security’³⁶⁶ and therefore by the same right from which the tort remedies of defamation and intentional infliction of emotional harm followed.³⁶⁷ Seen from this perspective, Prosser’s ‘reductionist’ approach to privacy seems inconsequential – since all three causes of action originally stem from the same personal right, it seems arbitrary to deny privacy the status of an interest worth protecting for its own sake.³⁶⁸

So what happened on the way from Warren and Brandeis to Prosser? The change is illustratively encapsulated in Bloustein’s famous response to Prosser’s seminal article, which spawned the contemporary quadripartite tort. Bloustein vigorously insisted that a privacy violation results in an injury to one’s individuality ‘and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.’³⁶⁹ This seems to presuppose the existence of an individual right to privacy from which relational duties follow; the plaintiff should be able to seek recourse ‘through law that belongs to the right holder whose rights have been violated.’³⁷⁰ Bloustein’s criticism was not directed against the categorisation into different remedies, but he denounced the fact that privacy as a distinct underlying and unifying rationale had gone missing. However, this was not necessarily happenstance and we will now turn to Prosser’s theoretical conception of torts.

³⁶⁶ The Court defined the right as protecting the ‘legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation’ - *Pavesich v New England Life Ins Co*, 50 SE 68, 70 (1905). For further details concerned with the transformation of the original ‘external right to personal security’ to privacy as an ‘internal right to personal security’ see S J Heyman, ‘Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression’ (1998) 78 *Boston University Law Review* 1275, 1324.

³⁶⁷ The Court also discussed the ‘injuria’ concept of Roman law - *Pavesich v New England Life Ins Co*, 50 SE 68, 71 (1905).

³⁶⁸ Note that neither Blackstone nor any other common law commentator referred to a right of privacy. The *Pavesich*-court argued, ‘the illustrations given by [these commentators] as to what would be a violation of the absolute rights of individuals are not to be taken as exhaustive, but the language should be allowed to include any instance of a violation of such rights which is clearly within the true meaning and intent of the words used to declare the principle’ - *Pavesich v New England Life Ins Co*, 50 SE 68, 70 (1905).

³⁶⁹ E J Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 *New York University Law Review* 962, 1002. A similar point was made by S Ingber, ‘Rethinking Intangible Injuries: A Focus on Remedy’ (1985) 73 *California Law Review* 772, 841.

³⁷⁰ See J C Goldberg and B C Zipursky, ‘Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties’ (2006) 75 *Fordham Law Review* 1563, 1567; see also L R Meyer, ‘Unruly Rights’ (2000) 22 *Cardozo Law Review* 1, 12.

Our starting point will be the previous observation that contemporary mainstream tort theory in the USA is still regarded as quintessentially Holmesian. Holmes was sceptical about the notion of individual rights and obligations.³⁷¹ Instead, Holmes' perception of the law was akin to that of commands similar to the early utilitarian thinkers who influenced him.³⁷² His work therefore stood in stark contrast to the rights-based solutions favoured by Cooley or Brandeis.³⁷³

Prosser on the other hand was Holmes' disciple and therefore had a virtually identical view on torts.³⁷⁴ Both scholars understood tort law as consisting of liability rules, which made it necessary to eliminate the notion of individual right and correlative duty of classic common law.³⁷⁵ What followed from there was that the focus shifted from a right of the plaintiff to the duty of the defendant. The resulting method in order to determine liability is quite remarkable; '[t]here is a duty if the court says there is a

³⁷¹ See B C Zipursky, 'Rawls in Tort Theory: Themes and Counter-Themes' (2004) 72 *Fordham Law Review* 1923, 1927 ('[...] the dominant trend of American tort theory grows out of Holmes' brash and unapologetic s[c]epticism about concepts of duty and right'); J C Goldberg and B C Zipursky, 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733, 1781-2 ('On Holmes's view, duties, or more accurately, the state directives and sanctions which regulate conduct, "precede rights logically and chronologically"' internal citation omitted); W Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769, 783; T C Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 830; P S Atiyah, 'The Legacy of Holmes through English Eyes' (1983) 63 *Boston Law Review* 341, 350 and 381.

³⁷² J C Goldberg and B C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 *Fordham Law Review* 1563, 1566-7; see also their 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733, 1781-2. Scholars, as already indicated, see a lot of different things in Holmes. Of importance here is exclusively his disdain for individual rights and duties. From a Social-Darwinian perspective, conferring rights to an individual seems impossible; the same holds true if one would regard Holmes as a so-called 'pragmatist' (position of, eg, E W Thomas, *The Judicial Process* (2005) 303) - see R M Dworkin, *Law's Empire* (1986) 152 ('Pragmatism, [...], denies that people ever have legal rights [...]').

³⁷³ W Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769, 782. Leebron also mentions that around the time *The Right to Privacy* was published two conceptions of tort law had emerged: one based on rights, the other based on liability rules - at p 785. See also T Cooley, *The Elements of Torts* (1895) 27.

³⁷⁴ J C Goldberg and B C Zipursky, 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733, 1756.

³⁷⁵ T C Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 831; see also G Joyce, 'Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy' (Book review) (1986) 39 *Vanderbilt Law Review* 851, 862 ('In his typical fashion, Prosser had collected the cases, rationali[s]ed their results by distilling the underlying concerns of the courts, balanced the interests at stake in each of the various (but previously unrecognized) branches of the tort, and stated general rules for use in deciding future cases' - emphasis added). 'Typical fashion' means that Prosser collected, for example, over 15.000 cases for the first edition of his *Handbook of the Law of Torts* in order 'to dramati[s]e the diversity of the reported decisions and presumably also to emphasize the need for general rules' - at p 856.

duty; the law, like the Constitution is what we make it' as Prosser put it.³⁷⁶ This duty therefore does not correspond with a right of the plaintiff.³⁷⁷ Furthermore, the court imposes 'duties of all the world to all the world' according to Holmes.³⁷⁸ The relationship between individual litigants has apparently no decisive bearing on the outcome of the case either – whether the defendant owes a duty to the plaintiff is irrelevant.³⁷⁹ The same holds true for fairness considerations in individual cases.³⁸⁰ The judge rather has to ask herself whether it is for the good of society to permit liability under certain circumstances.³⁸¹ This approach implies an instrumentalist view, which is characterised by focusing on social goals (such as wealth maximisation) tort law is supposed to further.³⁸² These social goals are established independently of tort law itself. With Prosser, one could thus argue that tort law is primarily a form of 'social engineering.'³⁸³ An important aspect of this process is ensuring predictability of the law. As regards negligence theory, for instance, Holmes opined that his duties to the world are 'nothing but a prediction' that someone will be held liable.³⁸⁴ Such an instrumentalist approach, as

³⁷⁶ W L Prosser, 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1, 15. For a convincing critique of this peculiar view see H L A Hart, *The Concept of Law* (Clarendon 2nd ed, 1994) 141 - this implies for instance a denial that courts are bound by any rules – 'the score is what the scorer says it is'; that is 'the game of the "scorer's discretion"').

³⁷⁷ All this is not to be misunderstood as a critique. Tushnet, for instance, argues that positive rights are simply foreign to US culture. Instead, the focus lies on negative liberty because of fear that others might 'crush their individuality.' Tushnet also indicates that what might be inappropriate in the USA is not necessarily unsuitable for other societies - 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363, 1392.

³⁷⁸ O W Holmes, 'The Theory of Torts' (1873) *American Law Review* 652, 660 as cited in J C Goldberg and B C Zipursky, 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733, 1759-60; see also W L Prosser, 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1, 6.

³⁷⁹ See also W L Prosser, 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1, 6 and 22; J C Goldberg and B C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 *Fordham Law Review* 1563, 1568 (Holmesian liability rules (so-called 'duties') are 'created by the state, and owed to the state'). See also R A Smolla, 'Privacy and the First Amendment Right to Gather News' (1999) 67 *George Washington Law Review* 1097, 1120 who argues that privacy torts, in contrast to defamation as a 'classic example' are not conceptualised as 'relational.'

³⁸⁰ See G P Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 537, 556.

³⁸¹ J C Goldberg and B C Zipursky, 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733, 1740

³⁸² See P Cane, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 203, 204; see also E J Weinrib, 'Understanding Tort Law' (1989) 23 *Valparaiso University Law Review* 485, 513 (1989); J L Coleman, 'The Mixed Conception of Corrective Justice' (1992) 77 *Iowa Law Review* 427, 431-2.

³⁸³ W L Prosser, *Handbook of the Law of Torts* (1941) 17 as cited by C P Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 *Yale Law Journal* 524, 582.

³⁸⁴ Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 834 fn 218 (1989) (internal citation omitted); W L Prosser, 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1, 22.

some say, thereby appeals to ‘a distinctively American style of individualist ideology.’³⁸⁵

The aforementioned liability rules are aimed at clarifying the range of permissible individual choices; the rules therefore do not focus on wrongdoing (in terms of some form of harm done to the plaintiff’s interest) since this might imply a ‘chilling effect’ on the range of these choices.³⁸⁶ It seems as if ‘[t]he wrong involved is the *failure to compensate* [the plaintiff], not the *infliction of damage*.’³⁸⁷ In more concrete terms one could argue that the public dissemination tort as a communicative tort has to pay due regard to the maintenance of the marketplace of ideas, which requires the application of strict formal rules in order to avoid a ‘chilling effect’ on private choices and therefore on the marketplace itself.³⁸⁸ Liability rules are, then, to be understood as minimal restraints on an otherwise unfettered self-interest of the defendant.³⁸⁹ One may therefore hazard a guess that such a conception of tort law is the congenial partner to protect the liberty interests of defendants and thus freedom of speech. In *Romaine v Kallinger*,³⁹⁰ for instance, the court stressed the tension between the First Amendment and the publication of truthful information and concluded, ‘[t]his constitutional dimension explains the stringency of the requirements that must be met in order to successfully establish this privacy-invasion cause of action.’ In sum, these liability rules posit only minimal restraints whereas the newsworthiness element is granted virtually without any constraints leaving behind a practically defunct tort.

³⁸⁵ P Cane, ‘The Anatomy of Private Law Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 203, 204 citing N Duxbury, *Patterns of American Jurisprudence* (1995) 418. See also D Kennedy, ‘Form and Substance in Private Law Adjudication’ (1975) 89 *Harvard Law Review* 1685 (‘[...] individualism seems to harmonize with an insistence on rigid rules rigidly applied’). For general discussion of ‘instrumentalism’ see D Lyons, ‘Legal Formalism and Instrumentalism – A Pathological Study’ (1980-81) 66 *Cornell Law Review* 949, 952.

³⁸⁶ See D Kennedy, ‘Form and Substance in Private Law Adjudication’ (1975) 89 *Harvard Law Review* 1685, 1695, 1698.

³⁸⁷ *Ibid.*, at p1694.

³⁸⁸ Kennedy suggests that the deductive process of determining the boundaries of legal liability were part of a larger ‘individualist argument designed to link the very general proposition, that the American system is based on freedom, with the very concrete legal rules and doctrines of the legal order’ - ‘Form and Substance in Private Law Adjudication’ (1975) 89 *Harvard Law Review* 1685, 1730-1.

³⁸⁹ *Ibid.*, at pp 1695, 1718.

³⁹⁰ 537 A 2d 284, 298 (1988).

The already familiar example saying that photographing a person in public (or filming as in *Shulman*) cannot constitute a privacy violation seems to be such a liability rule - the court simply does not permit legal liability for taking photographs in a public place regardless of the circumstances. Prosser, as we recollect, thought that taking a photograph does not differ from 'making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.'³⁹¹ What Prosser describes are private choices ranging from 'seeing', making a 'record', a 'full written description' or a 'photograph.' Singling out 'taking a photograph' as actionable conduct would thus be understood to 'chill' the choices available to the defendant's self-interest. The examination focuses entirely on the conduct of the defendant, but the possible harm or wrongdoing inflicted upon the individual plaintiff - as required for a genuine relational duty - is irrelevant.³⁹² In other words, to abstain from filming or photographing persons in public places, as it were, does not imply a duty of the defendant to the entire world. The social goal is obviously that everything happening in these locations should be freely discussed. In the author's respectful view, any consideration or analysis of the privacy interests of the *plaintiff* or what privacy as a legal concept may entail is absent from this framework.³⁹³

This becomes perhaps more intelligible when we turn to the publicity element of the tort. Without dwelling too much on this point in this context – the claimant has to show a dissemination of private facts to the public at large.³⁹⁴ This could be easily interpreted as being a minimum restraint on the defendant's self-interest. As long as the private information is merely communicated to one person, a small group or a larger group that does not constitute dissemination to the public at large (whatever that may be), the range of permissible actions is not to be chilled unless they exceed the minimal

³⁹¹ W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 391.

³⁹² In Holmes' tort theory, for instance, 'blameworthiness' is to be understood as 'socially blameworthy' not 'morally blameworthy'; 'fault' is to be understood as 'social fault' not individual 'moral fault' - P S Atiyah, 'The Legacy of Holmes through English Eyes' (1983) 63 *Boston University Law Review* 341, 351.

³⁹³ See also Note 'In the Face of Danger: Facial Recognition and the Limits of Privacy Law' (2007) 120 *Harvard Law Review* 1870, 1876 citing *Fogel v Forbes Inc*, 500 F Supp 1081, 1087 (1980) as saying that the intrusion tort simply does 'not apply to matters which occur in a public place or a place otherwise open to the public eye.' Suggestions to the same effect have also been made with regard to the Fourth Amendment – A Taslitz, 'The Fourth Amendment in the Twenty-First Century: Technology, Privacy and Human Emotions' (2002) 65 *Law and Contemporary Problems* 125,150.

³⁹⁴ W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 393 (1960).

restraint. Again, whether harm is done to the plaintiff by dissemination to a small group etc is irrelevant - the duty is not owed to the plaintiff, as a 'duty of the entire world' it is owed 'to the entire world.'³⁹⁵ The test thereby also provides an illustrative example of tort law conceptualised as a form of social engineering.³⁹⁶ Nevertheless, this approach ensures a high degree of predictability; the defendant knows very well in advance that she is unlikely to be held liable even if private information is disseminated to a small group of people.³⁹⁷

In sum, to assume particularly a 'fallacious view of privacy as an all-or-nothing concept' or 'privacy as secrecy' seems to project sophistication into the law that just is not there.³⁹⁸ The tort and the decisions of the courts represent, if anything, an all-or-nothing commitment to an individualistic concept. In brief, I should like to suggest that the reason is rather to be found in a tort theory striving for predictability, which produces in practice formalistic or mechanical reasoning of the courts as a symptom.³⁹⁹ This tort regime accords well with the constitutional protection of freedom of speech. In both areas of the law, I suggest, liberty interests do not correspond with individual responsibility; prevalent is rather a strong tendency to avoid 'chilling effects.'

Within those minimal restraints erected by these general liability rules, however, it is expected that 'it is up to the parties to look after themselves.'⁴⁰⁰ And in this respect, I heartily agree with Paton-Simpson's splendid metaphor that especially the *plaintiff* has

³⁹⁵ See also *Kaletha v Bortz Elevator Co Inc*, 383 NE 2d 1071, 1075 (1978) - the court dismissed the claim because disclosure was not 'directed toward the entire world'; A B Vickery, 'Breach of Confidence: An Emerging Tort' (1982) 82 *Columbia Law Review* 1426, 1440 ('Privacy is a right against the public at large. Its doctrinal limits narrowly circumscribe the zone of proscribed conduct in order to prevent hindrance of public expression').

³⁹⁶ This point was perhaps unwittingly circumscribed by R C Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 *California Law Review* 957, 992: 'The justification of such a requirement [publicity] obviously cannot be the protection of individuals from mental distress or suffering. Its purpose must instead be understood in specifically social terms, as the maintenance of spontaneous and expressive forms of group interaction.'

³⁹⁷ For an abstract discussion on this point see J Smillie, 'Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand' [1996] *New Zealand Law Review* 254, 257.

³⁹⁸ See also S K Sandeen, 'Relative Privacy: What Privacy Advocates Can Learn From Trade Secret Law' [2006] *Michigan State Law Review* 667, 692-3 who argues that the protection of privacy in public places 'appears to be the product of happenstance and not of a reasoned and principled discussion of the desired scope of privacy protection.'

³⁹⁹ See also N Duxbury, *Patterns of American Jurisprudence* (1995) 41.

⁴⁰⁰ See D Kennedy, 'Form and Substance in Private Law Adjudication' (1975) 89 *Harvard Law Review* 1685, 1739.

to behave like a ‘reasonable paranoid’⁴⁰¹ in order to look after herself in real life. To this writer, this is nevertheless just a reflex of conceptualising tort law in terms of liberty of the *defendant*. As an interim result, it may be recorded that the aforementioned peculiarity of the privacy interest as being spoken of as a right of the plaintiff is semantic rather than substantial.⁴⁰²

It is therefore not without reason that scholars a mere 110 odd years after Warren and Brandeis’ article intensify a discussion concerned with ‘privacy as liberty.’⁴⁰³ The difficulties with privacy as liberty, however, are already well known for more than a century - since 1905.⁴⁰⁴ It does not seem self-evident why this should work any easier these days than more than a century ago. Moreover, it requires a shift as regards the general approach to privacy as a concept that is not based on human dignity.⁴⁰⁵ Privacy as liberty equates ‘privacy’ with ‘freedom’, which is ‘an almost exact inversion of the concept of privacy as dignity.’⁴⁰⁶ This also seems to imply that the distinction between

⁴⁰¹ E Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50 *University of Toronto Law Journal* 305.

⁴⁰² Jurisdictions which recently adopted the public disclosure tort merely referred to the Restatement as authority instead of an underlying right – see *Borquez v Ozer*, 923 P 2d 166, 172 (Colo App 1995).

⁴⁰³ See, eg, B C Murchison, ‘Revisiting the American action for public disclosure of private facts’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 32, 44; see also the illuminating discussion in *Bonome v Kaysen and Random House*, (2004) Westlaw 1194731 at p 3 (‘The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such wide scope [...] would impose a very serious limitation upon the right of privacy; but if it does, it is due to the fact that the law considers that the *welfare of the public* is better served [observation phrased in utilitarian terms of cost/benefit maximisation] by maintaining the liberty of speech and of the press than by *allowing an individual to assert his right to privacy* in such a way as to interfere with the free expression of one’s sentiments and the publication of every matter in which the public may be legitimately interested’ – emphasis added). The Court in *Bonome* cited *Pavesich v New England Life Ins Co*, 50 SE 68, 74 (1905). I would suggest that the US law has thus returned to where it started.

⁴⁰⁴ *Bonome v Kaysen and Random House*, (2004) Westlaw 1194731 at p 3 fn 5 citing *Pavesich v New England Life Ins Co*, 50 SE 68, 72 (1905): ‘It may be said that to *establish a liberty of privacy* would involve in numerous cases the perplexing question to determine where *this liberty ended* and the rights of others and of the public began [...] It may be that there will arise many cases which lie near the *border line* which marks the right of privacy on the one hand and the right of another individual or of the public on the other’ (emphasis added).

⁴⁰⁵ The language formerly based on dignity parlance has changed in parts of US scholarship since J Q Whitman’s article ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (2004) 113 *Yale Law Journal* 1151. For the effect see J Rosen, ‘The Purposes of Privacy: A Response’ (2001) 89 *Georgetown Law Journal* 2117, 2126 (instead of being based on human dignity and equality, German laws against sexual discrimination allegedly seek ‘to universalis[e] hierarchy and elevate all women so that they are legally entitled to the hono[u]r that used to be reserved for aristocratic women’). The new parlance can now be found in J Rosen, ‘Continental Divide’ [2004] *Legal Affairs* 49, 53 (‘Americans have always conceived of privacy primarily in terms of liberty [...]’).

⁴⁰⁶ See R C Post, ‘Three Concepts of Privacy’ (2001) 89 *Georgetown Law Journal* 2087, 2095.

privacy as constitutional liberty and a distinct ‘right to privacy’ grounded in tort is misleading if not misconceived.⁴⁰⁷ Holmes’ rejection of the notion of right and correlative obligation⁴⁰⁸ seems rather consequent in this context. It is arguably impossible to pit a right of privacy against freedom of speech broadly granted as liberty, which is why it seems advantageous to work towards a properly understood right to privacy⁴⁰⁹ that is to be pitted against a right to freedom of speech, for instance, in a constitutionalised tort.

The turning away from rights to the conduct of the defendant and her ‘duties’ is nonetheless not restricted to US law as the joint judgment rightly pointed out in *Hosking*.⁴¹⁰ We will therefore briefly examine whether the duties of US law differ in nature or character from those imposed in New Zealand, Wales and England.

2.3.2.3 *Ubi remedium ibi jus - Duties in New Zealand, the UK and the USA*

The joint judgment has winningly argued that a freestanding privacy tort fits into New Zealand’s legal landscape.⁴¹¹ Even though this issue was nipped in the bud,⁴¹² the discussion as to whether the probably parochial understanding of duties in the USA fits New Zealand’s legal framework has not received that much attention. Generally, it might be fruitful considering that relevant jurisdictions outside the USA have found the ‘justice tradition’ more appealing than the instrumentalist approach with its focus on social engineering.⁴¹³ The former is also more in tune with modern trends of affording legal protection to those suffering personal injury, which leads away from conduct-based approaches favoured by Holmes or Prosser.⁴¹⁴ A tort, which, as already indicated,

⁴⁰⁷ Compare *Richard v Wal-Mart Stores Inc*, (2007) Westlaw 1521467 at p 5.

⁴⁰⁸ The difference between obligation and duty is that ‘obligations are normally owed to definite individuals.’ A ‘duty’ usually requires considering other tasks and responsibilities towards others – J Rawls, *A Theory of Justice* (OUP, 1971) 113.

⁴⁰⁹ This would be a positive or ‘claim’ right -see M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 34.2.1.

⁴¹⁰ See also P S Atiyah, ‘The Legacy of Holmes through English Eyes’ (1983) 63 *Boston University Law Review* 341, 376 who argues that Holmes’ tort theory was in tune with the contemporary English view; N Jansen, ‘Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability’ (2004) 24 *Oxford Journal of Legal Studies* 443, 460.

⁴¹¹ *Hosking* [2005] 1 NZLR 1 (CA) paras 91–116.

⁴¹² At least pending further consideration in the Supreme Court of New Zealand - *Rogers v TVNZ Ltd* [2007] NZSC 91 para 144 per Anderson J; para 99 per McGrath J.

⁴¹³ See P Cane, ‘The Anatomy of Private Law Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 203, 204.

⁴¹⁴ See generally P S Atiyah, ‘The Legacy of Holmes through English Eyes’ (1983) 63 *Boston University Law Review* 341, 376; see also N Jansen, ‘Duties and Rights in Negligence: A Comparative and Histori-

entirely focuses on the defendant's conduct while it does not recognise the harm done to the plaintiff at least to a small degree, provides a useful incentive for heightened attention. To the best of my knowledge, there is admittedly no privacy-related discussion in this area. We will therefore superficially examine the duty of care in professional negligence and try to extrapolate general features for the privacy tort afterwards.⁴¹⁵

Genuine duties and strict liability rules

Generally, the rules or duties which replaced the rights of classic common law can be determined in two different ways: they could be either seen as (1) 'a law of liability rules' stipulating certain conditions which are either met or not regardless of any other particular fact of the case; or (2) 'a law that imposes [genuine] duties of conduct' based in part on the relationship of the litigants under the circumstances of the case.⁴¹⁶

In English negligence law, by way of illustration, the basis for imposing category (2) duties (or 'guidance rules'⁴¹⁷) was laid with Lord Atkin's famous 'neighbour' principle developed in *Donoghue v Stevenson*.⁴¹⁸ This principle, following the 'love thy neighbour as thyself' theme, contains *altruistic* as opposed to wholly *individualistic* elements.⁴¹⁹ From a mainland European perspective there is a right of the plaintiff at work beneath the surface.⁴²⁰ A New Zealand example of imposing a category (2) duty is *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*⁴²¹. Disputes seem numerous in this area of the law but the chief problem in both countries seems to be as to how the

cal Perspective on the European Law of Extracontractual Liability' (2004) 24 *Oxford Journal of Legal Studies* 443, 448 who argues that modern tort law is guided by the idea of fair compensation.

⁴¹⁵ The joint judgment, for instance, spoke of 'new duties of care' where claims relate to the plaintiff's reputation – *Hosking* [2005] 1 NZLR 1 (CA) para 136. This analysis proceeds on the assumption that generalisations with regard to the character of these 'duties' are possible.

⁴¹⁶ See J C Goldberg and B C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 *Fordham Law Review* 1563, 1572.

⁴¹⁷ *Ibid*, at p1563.

⁴¹⁸ [1932] AC 562, 580; see also *Anns v Merton London Borough Council* [1978] AC 728 per Lord Wilberforce.

⁴¹⁹ See also D Kennedy, 'Form and Substance in Private Law Adjudication' (1975) 89 *Harvard Law Review* 1685, 1695, 1717. The joint judgment regarded *Stevenson* as representing 'the foundation of consumers' rights – *Hosking* [2005] 1 NZLR 1 (CA) para 2.

⁴²⁰ N Jansen, 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' (2004) 24 *Oxford Journal of Legal Studies* 443, 462.

⁴²¹ [2005] 1 NZLR 324 (CA). For the discussion of a relational duty based on the facts of the case see S Todd, 'Twenty Years of Professional Negligence in New Zealand' (2005) 21(4) *Professional Negligence* 257, 264-65.

multifarious circumstances of various cases may be encapsulated in principles according to which the law can be developed.⁴²² It seems nonetheless settled that the conduct of the defendant has to be evaluated in the light of all circumstances in order to determine whether imposition of liability is 'just and reasonable.'⁴²³ This area of the law might therefore be summarised as being consonant with the aforementioned justice tradition.

Prosser, in contrast, had this to say: the neighbour principle is 'so vague as to have little meaning, and as a guide to decision [it has] no value at all.'⁴²⁴ Again, in Prosser's understanding the word duty 'serves a useful purpose in directing attention to the obligation to be imposed upon the *defendant*, rather than the *casual sequence of events*; beyond that it serves none.'⁴²⁵ As regards the 'proximate cause' element Prosser opined, 'all that it does is to direct *attention to the plaintiff* as well as the defendant, to the role of the *consequences* as well as that of the *fault*.'⁴²⁶ Relational duties owed to the plaintiff are a form of 'gibberish'⁴²⁷ and were to be replaced by duties to the world - the law is what we (or better you) make it.⁴²⁸ In sum, this implies an instrumentalist view on tort law. In the context of professional negligence Prosser's views would perhaps not be particularly successful outside the USA, but the question remains why a New Zealand court would accept his 'duties to the world' as outlined in the emulated privacy action.⁴²⁹ How, if possible at all, could this initial step be brought into accordance with the justice tradition as reflected, eg, in the law of negligence?

⁴²² See S Todd, 'Twenty Years of Professional Negligence in New Zealand' (2005) 21(4) *Professional Negligence* 257, 265; see also his 'Negligence and Policy' in P Rishworth (ed), *The struggle for simplicity in the law* (1997) 105, 110-1.

⁴²³ Ibid; see also his 'Negligence and Policy' in P Rishworth (ed), *The struggle for simplicity in the law* (1997) 105, 110-1. Compare J Smillie, 'The Future of Negligence' (2007) 15 *Tort Law Journal* 300, 308 who argues that tort liability for negligence should be abolished by statute.

⁴²⁴ W L Prosser, *Handbook of the Law of Torts* (2nd ed, 1955) 168 as cited by J C Goldberg and B C Zipursky, 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733, 1759. Prosser therefore seems to have embraced the dissenting opinion of Judge Andrews in *Palsgraf* - W L Prosser, 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1, 15, 24. Prosser quoted the Judge as saying, '[t]here is a *duty to the world at large* not to be negligent toward *any person* and when an injury results from a breach of *this duty*, she may have an action for negligence' - at p 6 (emphasis added).

⁴²⁵ W L Prosser, 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1, 15 (emphasis provided).

⁴²⁶ Ibid, at p 22 (emphasis supplied).

⁴²⁷ See J C Goldberg and B C Zipursky, 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733, 1758.

⁴²⁸ W L Prosser, 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1, 15, 22.

⁴²⁹ See S Todd, 'Twenty Years of Professional Negligence in New Zealand' (2005) 21 (4) *Professional Negligence* 257, 265-66 for the importance of the 'proximity' element in New Zealand.

In this respect, we will attempt to distinguish genuine category (2) duties from category (1) strict liability rules. The relevant distinction lies in the perspective, because one may take either an ‘external’ or an ‘internal point of view’ in order to examine a legal rule.⁴³⁰ In Holmes’ theory of criminal as of tort law⁴³¹, legal standards are ‘external, public, communal, or objective standards.’⁴³² Basically, they have the character of community mores tests. External standards insist on the fact that conduct may be evaluated ‘without regard to the *intent* or *state of mind* of the *individual actor*.’⁴³³ Instead, they focus for instance on the result of an act rather than the motivation behind the act.⁴³⁴

Take, by way of illustration, a quick glance at the ‘highly offensive to a reasonable person’ test.⁴³⁵ The test will be discussed in detail later on, but the problem is widely known. This model person, as the argument runs, can either stand in the shoes of the plaintiff or may be an outside observer who does not participate in the litigation itself (such as a reader of a newspaper learning about the plaintiff’s personal information). The first reasonable person takes an ‘internal point of view’ whilst the second

⁴³⁰ H L A Hart, *The Concept of Law* (Clarendon: 2nd ed, 1994) 89; R M Dworkin *Law’s Empire* (1986) 13-4.

⁴³¹ Holmes is one of the very few modern common law legal theorists proposing the same liability standards for torts and for criminal law – P S Atiyah, ‘The Legacy of Holmes through English Eyes’ (1983) 63 *Boston University Law Review* 341, 342.

⁴³² N Duxbury, *Patterns of American Jurisprudence* (1995) 40; see also R M Dworkin, *Law’s Empire* (1986) 14. For a more detailed discussion of the underlying psychological concept of the human being see C S Dailey, ‘Holmes and the Romantic Mind’ (1998) 48 *Duke Law Journal* 429, 438-9.

⁴³³ See H Hovenkamp, ‘Knowledge about Welfare: Legal Realism and the Separation of Law and Economics’ (2000) 84 *Minnesota Law Review* 805, 847; Hovenkamp also notes that Holmes ‘described the external standard as a device used by courts to add *consistency* and *predictive power* to the law’ – emphasis added); see also W A Lindquist, ‘Oliver Wendell Holmes and External Standards of Criminal and Tort Liability’ (1979) 28 *Buffalo Law Review* 607, 608. As a result, subjective motivations as a standard for imposing legal liability are rejected and supplanted by enshrining behaviourism as liability standard – C S Dailey, ‘Holmes and the Romantic Mind’ (1998) 48 *Duke Law Journal* 429, 484.

⁴³⁴ See W A Lindquist, ‘Oliver Wendell Holmes and External Standards of Criminal and Tort Liability’ (1979) 28 *Buffalo Law Review* 607, 617; H L A Hart, *The Concept of Law* (Clarendon 2nd ed, 1994) 89; P S Atiyah, ‘The Legacy of Holmes through English Eyes’ (1983) 63 *Boston University Law Review* 341, 350.

⁴³⁵ Prosser’s own view is ambivalent on this matter. He merely mentioned that the test constitutes something in the nature of a mores test ‘under which there will be liability only for those things which the customs and ordinary views of the community would regard as highly objectionable’ – *Handbook of the Law of Torts* (4th ed, 1971) 812. Arguments may be mounted both ways but the author interprets this as an external test. See also A B Vickery, ‘Breach of Confidence: An Emerging Tort’ (1982) 82 *Columbia Law Review* 1426, 1440 – Vickery quotes the Restatement (Second) of torts as saying that ‘the matter publicized is of a kind that [...] would be highly offensive to a reasonable person’; he interprets this standard as focusing on the *contents* of the publicised material.

perspective of examination is external. Interestingly, an internal standpoint has been associated with the recognition of the full circumstances of the particular case in order to determine the *plaintiff's* 'state of mind.'⁴³⁶ By and large, this test represents a genuine English/New Zealand category (2) duty. The subsequent problem, as we will see in due course, is then as to how objective an objective test remains under these auspices.

An external point of view, by contrast, is exclusively concerned with the inherent offensiveness of the disseminated material. The external standpoint represents a category (1) strict liability rule because only a limited condition (offensiveness of the facts themselves) has to be met while the remainder of the context is irrelevant.⁴³⁷ However, as Burrows pointed out, only a few facts are inherently offensive and for a 'just and reasonable' judgment, the disclosure has to be examined from an internal viewpoint.⁴³⁸ This seems to be the generally preferred viewpoint in England. The external point of view taken by the Court of Appeal in *Campbell* was astutely identified as 'quite unreal' by Lord Hope.⁴³⁹ In this context, it is perhaps important to note that the internal perspective is also taken in order to determine an 'obligation of confidence' as an element of the classic breach of confidence doctrine.⁴⁴⁰ This element was in turn based on an analogy from the 'duty of care' in tort law.⁴⁴¹

⁴³⁶ See also R M Dworkin, *Law's Empire* (1986) 13, who argues that the 'internal actor' takes 'the view of those who make the claims'; *Campbell* [2004] 2 All ER 995 (HL) para 99 per Lord Hope ('The *mind* that has to be *examined* is that, not of the reader in general, but of the person who is affected by the publicity' – emphasis added).

⁴³⁷ See also J Smillie, 'Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand' [1996] *New Zealand Law Review* 254, 255. As regards the US public disclosure tort, it is difficult to find a structured discussion on this point. But see, eg, *Kitt v Capitol Concerts Inc*, 742 A 2d 856, 860 (1999) (the case was concerned with putting someone (here a concert clarinetist) into 'false light' claim; '[...] the offensiveness of such alleged tortious conduct is measured by an 'ordinary, reasonable person' standard, not that of a reasonable performing artist [...]').

⁴³⁸ Kennedy makes a similar point by distinguishing between individualistic 'rules' and altruistic 'standards' – 'Form and Substance in Private Law Adjudication' (1975) 89 *Harvard Law Review* 1685, 1740. See also R M Dworkin, *Law's Empire* (1986) 13.

⁴³⁹ *Campbell* [2004] 2 All ER 995 (HL) para 99.

⁴⁴⁰ Megarry J, as he then was, argued that 'if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence' – *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415, 420-1.

⁴⁴¹ M Richardson, 'Privacy and Precedent: The Court of Appeal's Decision in *Hosking v Runting*' (2005) 11 *New Zealand Business Law Quarterly* 82, 85. See also *Anns v London Borough Council* [1978] AC 728, 758 per Lord Wilberforce ('A reasonable man in the position of the inspector [...]').

The same pattern is valid for other tests or elements of the tort. The current US private facts test seems to be a strict category (1) liability rule inasmuch as an external actor merely observes the nature of the location regardless of the remaining facts of the case – the actor does not take part in the litigation as an internal actor would.⁴⁴² That is perhaps not necessarily ‘just and reasonable.’ An internal actor would pay due regard to the motivation behind the act and would therefore not be content with its bare result. Those arguing in favour of a relaxation of the test consequently take an internal point of view. They ‘do not want *predictions* of the legal claims they will make but *arguments* about which of these claims is *sound* and *why*.’⁴⁴³ Consequently, they suggest considering, for example, the plaintiff’s own efforts of keeping things private even in public places as well as the defendant’s manner, method, motive and fixation (ie, filming etcetera) of the information obtained.⁴⁴⁴ In short, arguments are made particularly with regard to putative contexts of individual cases. Effectively, this leads to the application of a genuine category (2) duty, which we have associated with the law of New Zealand and the UK in the context of professional negligence.

Lastly, Prosser’s publicity element is a category (1) strict liability rule because an external actor merely observes as to whether personal information has been disseminated to the public at large and nothing else. Again, the result of an act is decisive and not the motivation behind it. That is perhaps again not necessarily just and reasonable. Hence, the critic takes once more an ‘internal point of view’ and considers a relaxation of the strict rule accompanied by ‘an enumeration of all the particular factors in the situation mitigat[ing] the failure to avoid over- and underinclusion.’⁴⁴⁵ Disclosure to, say, even one person can be hurtful and ‘if the new tort is to be *fully effective* it should

⁴⁴² See also H L A Hart, *The Concept of Law* (Clarendon 2nd ed, 1994) at p 143 (‘It is important to observe that if the game played were “scorer’s discretion” then the relationship between official and unofficial statements would necessarily be different: the player’s statement not only *would* be a prediction of the scorer’s rulings but *could* be nothing else” – emphasis his).

⁴⁴³ R M Dworkin, *Law’s Empire* (1986) 13 (emphasis added).

⁴⁴⁴ See R A Smolla, ‘Privacy and the First Amendment Right to Gather News’ (1999) 67 *George Washington Law Review* 1097, 1124; see also N A Moreham, ‘Privacy in Public Places’ (2006) 65(3) *Cambridge Law Journal* 606, 620-32; A J McClurg, ‘Bringing Privacy Law Out of The Closet: A Tort Theory of Liability for Intrusions in Public Places’ (1995) 73 *North Carolina Law Review* 989, 1058.

⁴⁴⁵ See D Kennedy ‘Form and Substance in Private Law Adjudication’ (1975) 89 *Harvard Law Review* 1685, 1740. Both over- and underinclusion is an obvious disadvantage of strict liability rules - J Smillie, ‘Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand’ [1996] *New Zealand Law Review* 254, 257.

be able to extend to such a situation.’⁴⁴⁶ One would again consider the context of the individual case, would be concerned with the harm done to plaintiffs and look for arguments in order to determine whose claim is sound and why. However, these arguments are not what the original strict liability rule is all about because it is obvious that the allowance of arguments would be detrimental to the predictability of the law. To the present writer, the US tort is fully effective as long as the defendant’s permissible range of choices is predictable. Allowing arguments why a particular claim is sound would rather result in a genuine category (2) duty (owed to a plaintiff or at least a group of plaintiffs) in exchange for the Holmesian category (1) duty owed to the entire world.

After all, it is fair to conclude that ‘fair und reasonable’ results require recognising the harm (whether in form of an invasion of a right or otherwise)⁴⁴⁷ done to the plaintiff as well as the relationship between the litigants under the circumstances. It may be true that all three legal systems involved in this analysis have replaced rights with duties, but particularly in New Zealand it may be worthwhile considering whether the matter has been taken a step further in American law. To my mind, there is a world of difference between a legal system that replaced rights with genuine duties (such as those based on the neighbour principle) and a system that seems to appreciate Holmes’ dissolution of ‘moral ideas and rights’ in ‘cynical acid.’⁴⁴⁸ The former takes us already a significant step towards a rights-based approach since a right is already operating beneath the surface.

It sounds embarrassingly simple, but it is suggested that it should be first and foremost clear whether the tests of the new privacy action are to be examined from an ‘internal’ or an ‘external point of view.’ The point at issue is whether the justice tradition should be continued or be partly replaced in the privacy context by an instrumentalist view as pursued in the USA. Moreover, I would like to suggest that one of these views should be maintained throughout the adjudication of the whole cause of action.

⁴⁴⁶ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005), para 18.5.04 at p 759-60 (emphasis added); see also U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 252.

⁴⁴⁷ The importance of this distinction was emphasised by M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 23.

⁴⁴⁸ P S Atiyah, ‘The Legacy of Holmes through English Eyes’ (1983) 63 *Boston University Law Review* 341, 381.

As regards the ‘highly offensive’ test, there is certainly a preference for the internal view evolving – a good thing because that is just and reasonable. But if the ‘private facts’ or ‘publicity’ tests were examined from an external angle beforehand, cases would be dismissed without these considerations simply because the dissemination did not reach the public at large etcetera. The actual outcome would not necessarily be just and reasonable. The perspective of the actor, as it were, is not a question confined to a single test – it is a general commitment as to how the law is approached or examined.

The joint judgment, for instance, conceded that they would allow liability in public places under ‘particular circumstances’ whereas liability is ‘generally’ to be denied.⁴⁴⁹ This could of course signify the decision to develop the tort incrementally, but adopting our methodology it means that the actor should ‘generally’ take an ‘external point of view’ (inspired by US cases) and under ‘particular circumstances’ an internal angle (particularly influenced by decisions from the UK). It is fair to say that the law of the UK clearly follows the justice tradition. It is also fair to say that many New Zealand judges and scholars intuitively seem to prefer the ‘internal point view.’ It is, then, questionable why one would adopt - or maintain - these strict rules in the first place given that they are incompatible with the justice tradition.⁴⁵⁰ From my point of view, it is difficult to figure out how a principled development of the New Zealand tort could be possible under these auspices.⁴⁵¹ Again, one may compare legal systems but individual cases may not necessarily be comparable. In a sense, mixing the approaches taken in the UK and USA would be as if one would say that the neighbour principle is ‘generally’ gibberish (Prosser’s view) and adopt an approach based on the neighbour principle un-

⁴⁴⁹ *Hosking* [2005] 1 NZLR 1 (CA) para 164. Their Honours had apparently an incremental development of the tort in mind.

⁴⁵⁰ See also R S Summers, ‘How Law is Formal and Why it Matters’ (1997) 82 *Cornell Law Review* 1165, 1208-9 (‘And if form is not appropriate, if wrong choices are made as to form, and if these wrong choices are consequential, it follows that form matters practically and that it requires due attention’).

⁴⁵¹ I should point out that I presuppose a ‘principled approach’ due to my legal background - see E W Thomas, ‘A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy’ (1993) 23 *Victoria University of Wellington Law Review* Monograph 5 for further options. Although both terms describe different things to the present writer, ‘principled’ and ‘incremental’ development of the law are sometimes equated – eg, R Tobin, ‘Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand’ (2004) 12 *Tort Law Journal* 95, 101; M Waterfield, ‘Now You See It, Now You Don’t: the Case for a Tort of Infringement of Privacy in New Zealand’ (2004) 10 *Canterbury Law Review* 182, 200-01.

der ‘particular circumstances.’ A civil lawyer cannot be sure whether this is sound common law, but it seems peculiar with regard to a principled approach.

Thus, it is suggested that the law should follow either an instrumentalist approach or the justice tradition – not both in a seemingly confused manner. After all, this might indicate that New Zealand is better off adopting the British framework and developing its own ‘rules.’ We will now consider further why an internal viewpoint might be preferable. As I attempt to show briefly, it is a necessary precondition of applying any advanced concept of privacy.

Genuine duties as a necessary precondition for privacy concepts

The application of any sophisticated theoretical concept of privacy seems to presuppose an understanding of the tort’s purpose other than an instrumentalist view aimed at social engineering. Firstly, at least any non-reductionist theoretical conception is in some respect concerned with the individual demands of the plaintiff who has an interest in preserving her privacy (for instance an interest in secrecy, anonymity, identity, personhood/personality etc). Secondly, advanced concepts usually continue by attempting to characterise as to how another person may interfere with those interests; ie, they specify the type of the defendant’s actionable conduct (for example misusing her personal information by ‘accessing’ the information, gaining ‘control’ over its use etcetera).⁴⁵² By applying such concepts, the relationship between plaintiff and defendant is becoming the leitmotiv. These concepts, thus, take the plaintiff’s concerns as well as the conduct of the defendant into account.⁴⁵³ In terms of tort theory, these issues involve considerations of ‘wrongdoing’ and ‘causation.’ As William Lucy points out, wrongfulness can be determined from two perspectives - that of the defendant and that of the

⁴⁵² Privacy is therefore regarded as something that pre-exists the interaction of the parties - L R Meyer, ‘Unruly Rights’ (2000) 22 *Cardozo Law Review* 1, 8.

⁴⁵³ See also E J Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, 511 discussing what he calls ‘inherent ordering’ of tort law. According to this view, tort law is a coherent ‘bipolar procedure’ between both litigants; ‘[t]he defendant’s injuring of the plaintiff and the plaintiff’s recovery of damages from the defendant are mutually connected, so that the procedure is the [...] appropriate response to what the defendant has done to the plaintiff.’ The procedure is presupposed by the ‘causation’ of harm and the ‘procedure is not severable from the injury to which it responds.’ Weinrib’s approach (as well as Coleman’s) utilises the ‘internal point of view’ - W N R Lucy, *Philosophy of Private Law* (2007) 274.

plaintiff⁴⁵⁴ or both, as I should add. In the context of a privacy tort, both perspectives are arguably relevant. Causation, on the other hand, links doer and sufferer of a particular form of harm.⁴⁵⁵

Hence, it is suggested that one of the first steps in the discussion of a new cause of action outside the USA should be concerned with the function of this action.⁴⁵⁶ Given that the application of a privacy concept shifts the perspective from the defendant's conduct to the relationship of the litigants involved in a particular legal claim, it follows as a corollary that it should be considered whether these relationships are relevant in the first place - in a tort comprised of category (1) strict liability rules they are not in my respectful view. In the context of US law, it is only relevant what conduct of the defendant triggers liability.⁴⁵⁷ Consequently, only the defendant's actions determine 'wrongdoing.' Applying a particular concept of privacy, in contrast, only makes sense if the plaintiff's interest (however defined) actually 'matters.' However, this is precisely what Prosser tried to avoid, for instance, when he argued that a relational approach to 'duties' in negligence would direct attention to the plaintiff, the consequences of the defendant's conduct and its individual rather than social blameworthiness. As a result, it is questionable whether the theoretical structure of the US tort allows the application of any advanced concept of privacy. As we will see later during the discussion of the 'publicity' test, the recognition of the harm done to the plaintiff by a minor dissemination conflates, for instance, the 'publicity' and the 'highly offensive' test. It is therefore at least arguable that the strict liability rules have to be strictly kept separate – if it were otherwise, the structure of the tort gets cracks and fissures.

2.3.2.4 *Two versions of a reasonable expectation of privacy*

Thus far, we came quite a long way from the formalistic adjudication of the private facts test to an underlying concept of torts. In the USA it has been observed that the 'concept of right (*Recht*) shapes [for instance] German legal thought as reasonableness directs common law reasoning;' the reliance on reasonableness 'facilitates [in the

⁴⁵⁴ W N R Lucy, *Philosophy of Private Law* (2007) 206.

⁴⁵⁵ E J Weinrib, 'Causation and Wrongdoing' (1987) 63 *Chicago Kent Law Review* 407, 410

⁴⁵⁶ See also T Honoré, *Responsibility and Fault* (1999) 68-9.

⁴⁵⁷ See also W N R Lucy, *Philosophy of Private Law* (2007) 206.

USA] flat legal thinking' whereas a concept of right facilitates a 'style of structured legal discourse.'⁴⁵⁸ In what is now apparently seen as traditional common law the application of reasonableness standards therefore replaces what is in other legal systems a concept of right.⁴⁵⁹ However, we have also seen that a duty in common law can be fashioned in quite different ways. To my mind, a genuine category (2) duty that we have associated with New Zealand and the UK is still a duty and not a right, but it does not facilitate 'flat legal thinking.' A duty understood in terms of the justice tradition is not dissimilar to a properly understood concept of right.⁴⁶⁰ The difference would largely be one of structure rather than substance. The interpretation of duties in the USA, by contrast, allows liability merely because of commands issued by the courts.⁴⁶¹ Particularly Prosser captured the notion of law as commands, I think, eloquently by asserting that the law is 'what we make it.' As the Swedish scholar Hägerström pointed out, 'the whole theory of subjective rights of private individuals [...] is incompatible with the imperative theory.'⁴⁶² From a mainland European perspective, there is, in other words, nothing left beneath the surface which resembles the notion of rights.

Nowadays, the command theory is thus widely rejected as crude and anachronistic.⁴⁶³ This does not necessarily mean, however, that there is no kinship with contemporary US law. This will be elucidated by pointing briefly to the two different meanings of a 'reasonable expectation of privacy' - one is concerned with criminal procedure focus-

⁴⁵⁸ G P Fletcher, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949, 951-2; see also W Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769, 808.

⁴⁵⁹ See also J C Goldberg and B C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 *Fordham Law Review* 1563, 1565 arguing that in the days of Blackstonian common law the directives of tort law were rooted in individual rights which placed particular obligations on defendants.

⁴⁶⁰ N Jansen, 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' (2004) 24 *Oxford Journal of Legal Studies* 443, 462-3.

⁴⁶¹ J C Goldberg and B C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 *Fordham Law Review* 1563, 1567.

⁴⁶² A Hägerström, *Inquiries into the Nature of Law and Morals* (K Olivecrona ed, 1953) 217 as cited in H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 605; J L Coleman and J Kraus, 'Rethinking the Theory of Legal Rights' (1986) 95 *Yale Law Journal* 1335, 1340 (The authors argue that classical liberal rights are incompatible with liability rules). See also G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705, 715. ('[...] utilitarianism has been traditionally understood as the biggest enemy of rights, why in fact, liberal rights themselves emerged as an objection to utilitarianism').

⁴⁶³ G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705, 715.

sing on people, the other with tort law stressing the importance of places.⁴⁶⁴ I should point out that this issue might be important because the phrase is used in all three legal systems compared here. The meaning of the test could be perceived quite differently however - it could either protect 'places' by command or 'people' by right or genuine duty.

The test originated⁴⁶⁵ most likely from *Katz v United States*⁴⁶⁶ and this case will indicate the first possible meaning of the test concerned with the protection of people. The case was concerned with a telephone conversation conducted from a public telephone booth. The FBI⁴⁶⁷ overheard these conversation using listening devices. The question arose whether a 'constitutionally protected *area*' could exist in such a public environment.⁴⁶⁸ The US Supreme Court found this contention misleading 'for the Fourth Amendment protects *people*, not *places*.'⁴⁶⁹ According to Justice Harlan, the determination of a reasonable expectation required two distinct considerations: firstly, the plaintiff's individual expectations against governmental search and seizure had to be investigated (akin to a subjective expectation of privacy); and secondly 'that the expectation be one that society is prepared to recogni[s]e as "reasonable"' (akin to an objective expectation of privacy).⁴⁷⁰ This is perfectly consonant with a subjective right of a

⁴⁶⁴ Tort law and Fourth Amendment are the two areas where the law operates with 'reasonable expectations' – S B Spencer, 'Reasonable Expectations and the Erosion of Privacy' (2002) 39 *San Diego Law Review* 843, 847 (2002). In the tort context the test is predominantly applied in intrusion into solitude or seclusion cases - R A Smolla, 'Privacy and the First Amendment Right to Gather News' (1999) 67 *George Washington Law Review* 1097, 1118.

⁴⁶⁵ See H T Gómez-Arostegui, 'Defining Private Life Under The European Convention on Human Rights by Referring to Reasonable Expectations' (2005) 35 *California Western International Law Journal* 153, 163.

⁴⁶⁶ 389 US 347 (1967).

⁴⁶⁷ Acronym for: Federal Bureau of Investigation.

⁴⁶⁸ *Katz v United States*, 389 US 347, 351 (1967). Until *Katz*, the test was indeed as to whether a physical intrusion in a 'constitutionally protected area' had occurred - S K Sandeen, 'Relative Privacy: What Privacy Advocates Can Learn from Trade Secret Law' [2006] *Michigan State Law Review* 667, 695.

⁴⁶⁹ *Ibid.* The Fourth Amendment provides a 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, will not be violated [...]' The Court thereby rejected the "'trespass' doctrine". The judgment has been described as 'revolutionary' because it changed centuries of common law thinking - *Hosking* [2005] 1 NZLR 1 (CA) para 225 per Tipping J.

⁴⁷⁰ *Katz v United States*, 389 US 347, 361 (1967); see also L R Meyer, 'Unruly Rights' (2000) 22 *Cardozo Law Review* 1, 34; S B Spencer, 'Reasonable Expectations and the Erosion of Privacy' (2002) 39 *San Diego Law Review* 843, 847. It should be noted, however, that *Katz* seems to be a rare exception. Generally speaking, the Fourth Amendment protects a person's *home* and therefore grants little protection in public places - A J Lum, 'Don't Smile, Your Image Has Just Been Recorded On A Camera-Phone: The Need For Privacy In The Public Sphere' (2005) 27 *University of Hawaii Law Review* 377, 389; D J So-love, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 497; L E Roth-

private person as opposed to an imperative command. The test, sensibly, protects an individual expectation that does not necessarily imply legal recognition of the expectation.

We will now return to *Shulman v Group W* in order to determine the second meaning of a reasonable expectation of privacy concerned with places. In the author's opinion, the reasonable expectation test (or rather phrase) is used in a completely different fashion in the tort context. Given that the plaintiff would have been situated in a public telephone booth, as was the case in *Katz*, a court would simply hold that the plaintiff had no reasonable expectation qua public setting.⁴⁷¹ In *Shulman*, as we recollect, all that mattered was (1) 'plaintiff at accident site' equalled no reasonable expectation; and (2) 'plaintiff in helicopter' resulted in a reasonable expectation. In the context of the US tort, the test therefore seems to further what George Fletcher described as 'flat legal thinking.'

In this context, it is sometimes suggested that an appearance in a public place constitutes a 'waiver' of one's right to privacy or a 'consent' which implies surrendering reasonable expectations of privacy.⁴⁷² That this is only remotely relevant as regards US tort law is quite obvious however. The paraplegic plaintiff in *Shulman*, by way of illustration, was wondering whether or not she was dreaming and feeling that she wanted to die whilst being extricated from the car and brought to the helicopter. It is fair to assume that she had no subjective expectation of privacy under these circum-

enberg, 'Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space' (2000) 49 *American University Law Review* 1127, 1132; S K Sandeen, 'Relative Privacy: What Privacy Advocates Can Learn from Trade Secret Law' [2006] *Michigan State Law Review* 667, 695.

⁴⁷¹ Particularly an analogy to trespass is still explicitly drawn in the context of the intrusion tort - see, eg, *Alvarado v KOB-TV LLC*, (2007) Westlaw 2019752 at p 4 ('[...] intrusion is "distinct from but related to trespass," and "involves an invasion of the plaintiff's 'private' space or solitude-eavesdropping on private conversations or peeping through the bedroom window, for example"' - emphasis added; internal citations omitted); see also *Roe v Heap*, (2004) Westlaw 1109849 para 81.

⁴⁷² K M Beasley, 'Up-Skirt and other Dirt: Why Cell Phone Cameras and other Technologies Require a New Approach to Protecting Personal Privacy in Public Places' (2006) 31 *Southern Illinois University Law Journal* 69-70 who also notes that this has the advantage of a bright line test. However, since there is no threshold test identifiable as to what number of persons constitutes 'the public at large' the bright line test is no such bright line test - see L M Jennings, 'Paying the Price for Privacy: Using the Private Facts Tort to Control Social Security Number Dissemination and the Risk of Identity Theft' (2004) 43 *Washburn Law Journal* 725, 759.

stances. To argue that her (hypothetical) subjective expectations may have changed from ‘unreasonable’ to ‘reasonable’ during her transfer to the helicopter would involve an assumption non sequitur. Furthermore, the plaintiff’s objective or normative expectations not to be filmed surreptitiously and have her health problems publicised were the same inside or outside the helicopter.⁴⁷³ Hence, the very idea that she consented, waived her *soi-disant* right to privacy or that she realised that she simply ‘could not have had a reasonable expectation of privacy’⁴⁷⁴ in such a situation is quite daring.⁴⁷⁵ That the Court nonetheless came to different conclusions in this instructive case illustrates, as I would like to suggest, the difference between a privacy protection by ‘command’ whilst being in a public place (accident site) and a ‘permission’ to maintain privacy while being in a private place (helicopter as an analogy to a hospital room).⁴⁷⁶ The notion of law as commands is a general feature of American legal realism (or pragmatic institutionalism as Summers has labelled it)⁴⁷⁷, a matter to which we will return.

McNamara v Freedom Newspapers seems to confirm this impression. The defendant published a photograph depicting the plaintiff playing soccer; his genitals were accidentally exposed and the court held that he was ‘voluntarily participating in a spectator sport at a public place.’⁴⁷⁸ To presuppose the plaintiff’s consent or waiver in such

⁴⁷³ See *Shulman v Group W Production Inc*, 18 Cal 4th 200, 250 (1998) per Brown J (concurring and dissenting). I implicitly depart from E Paton-Simpson’s opinion here. The scholar (correctly in my view) characterises the ‘reasonable expectation’ test as an amalgam of descriptive and normative elements. She argues, ‘[n]ormatively, the position is taken [by the courts] that, to the extent public privacy exists, it is not worthy of legal protection’ - E Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50 *University of Toronto Law Journal* 305, 321. This is not a normative consideration but an ‘imperative command’ according to my thesis. Instead, considerations are made in terms of external ‘social goals’ tort law ought to achieve. The ‘validity’ of these goals ‘is prior and independent’ of the facts of the case – see E J Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, 487. As regards privacy in public places all relevant normative considerations have been made by Prosser, whose opinion hardened into the doctrine applied by the courts.

⁴⁷⁴ *Shulman v Group W Production Inc*, 18 Cal 4th 200, 213 (1998).

⁴⁷⁵ See also D M Worley, ‘*Shulman v Group W Productions*: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity’ (1999-2000) 27 *Western State University Law Review* 535, 569.

⁴⁷⁶ For a sensible discussion concerned with a waiver of a right see *Pavesich v New England Life Ins Co*, 50 SE 68, 72 (1905); for a sensible discussion of the ‘reasonable expectation’ test in a tort context see *Huskey v National Broadcasting Company Inc*, 632 F Supp 1282, 1291 (1986).

⁴⁷⁷ R S Summers, ‘On Identifying and Reconstructing a General Legal Theory – Some Thoughts Prompted by Professor Moore’s Critique’ (1984) 69 *Cornell Law Review* 1014, 1019.

⁴⁷⁸ *McNamara v Freedom Newspapers Inc*, 802 SW 2d 901, 905 (1991).

a situation seems again misconceived.⁴⁷⁹ Arguing by analogy one could claim that such reasoning rather reflects the essence of the ‘industrial accident’ rule formulated by nineteenth century British judges. According to this rule, factory workers were excluded from suing their employer for negligent injuries caused by another employee; the factory worker, as it were, ‘assume[d] the risk’ of being harmed due to the carelessness of ‘fellow servants.’⁴⁸⁰ However, similar to the worker who does not assume or accept being negligently harmed just because he works in a factory with supposedly careless co-workers, a soccer player does not consent to the - even less likely - public dissemination of a photograph showing his genitals just because he participates in a sport usually played in public places.⁴⁸¹ Implied consent is surely an issue, but the curtailment of *volenti non fit injuria* as general defence in negligence law might provide useful hints for the law outside the USA. As Lord Denning MR explained: ‘[k]nowledge of risk is not enough. Nor is a willingness to take the risk of injury.’⁴⁸²

Moreover, a normative argumentation in a case such as *McNamara* especially if based on a right to privacy would again come to a different conclusion. It is perhaps true enough to say that one’s genitals are a ‘clearly private’ matter even though they only indirectly belong to one’s ‘sex life.’⁴⁸³ A normative consideration would therefore, for instance, consider that ‘[i]t is genital nudity that Americans find most bizarre: One’s genitalia are “privates” in the full sense of the word in America, and one does not ordi-

⁴⁷⁹ Compare also D J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1147-8 who advances the familiar suggestion that the Court in *McNamara* conceptualised privacy as secrecy, which was in his view an inappropriate concept.

⁴⁸⁰ R M Dworkin, *Law’s Empire* (1986) 2. The rule was abandoned in England with the Law Reform (Personal Injuries) Act 1948 – *ibid* fn 3. See also generally P S Atiyah, ‘The Legacy of Holmes through English Eyes’ (1983) 63 *Boston University Law Review* 341, 359.

⁴⁸¹ In *Daily Times Democrat v Graham*, 162 So 2d 474, 478 (1964) - the Court argued, ‘[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust.’ Dworkin assumes, however, that the industrial accident rule ‘seemed less silly when Darwinian images of capitalism were more popular’ – *Law’s Empire* (1986) 2. Likewise, it could be argued that even contemporary judgments to this effect in the privacy context seem more appropriate when the Social Darwinian nature of First Amendment doctrine is taken into account.

⁴⁸² *Nettleship v Weston* [1971] 2 QB 691, 701. See E Simpson-Paton, ‘Privacy and the Reasonable Paranoïd: The Protection of Privacy in Public Places’ (2000) 50 *University of Toronto Law Journal* 305, 332 for further details regarding the privacy context. See also *X v Unknown Persons* [2007] EMLR 10 (QBD) paras 29 – 36 per Eady J.

⁴⁸³ For a similar opinion see also K M. Beasley, ‘Up-Skirt and other Dirt: Why Cell Phone Cameras and other Technologies Require a New Approach to Protecting Personal Privacy in Public Places’ (2006) 31 *Southern Illinois University Law Journal* 69, 74.

narily expose them in public, and certainly not before the opposite sex.’⁴⁸⁴ Following the already familiar scheme, such considerations were of no concern in *McNamara*; what was decisive was that the ‘photograph accurately depict[ed] a *public*, newsworthy event.’⁴⁸⁵ This case also indicates the preference for an individualistic concept detached from responsibility. The plaintiff proffered that the newspaper could have used one of its numerous other photographs in order to depict the soccer match as a newsworthy event (without exposing the plaintiff’s genitals). The Court held, ‘[t]he mere existence of an alternative means of expression cannot by itself justify a restraint on some particular means that the speaker finds more effective.’⁴⁸⁶ In sum, given that the ‘reasonable expectation’ is used in the context of the public disclosure tort, it protects places by command.⁴⁸⁷ As already indicated, the viability of individual rights of private persons under these circumstances is impossible.⁴⁸⁸

Considered in aggregation, it is suggested that there is no right of privacy whose infringement gives rise to a cause of action in the context of US law. What American scholars usually address as ‘right to privacy’ should be exclusively understood as a right to take *action* without an underlying right. Furthermore, a right to *compensation* is conferred by making out the action. In a nutshell, this is what might be described as privacy by permission as opposed to a right to privacy.⁴⁸⁹ When US scholars lament, by way of illustration, that the plaintiff’s privacy right has shrunk considerably over

⁴⁸⁴ J Q Whitman ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (2004) 113 *Yale Law Journal* 1151. See also L E Rothenberg, ‘Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space’ (2000) 49 *American University Law Review* 1127, 1135.

⁴⁸⁵ *McNamara v Freedom Newspapers Inc*, 802 SW 2d 901, 905 (1991).

⁴⁸⁶ *Ibid*, at p 904.

⁴⁸⁷ See also W J Chriss, ‘Personhood and the Right to Privacy in Texas’ (2007) 48 *South Texas Law Review* 575, 595 who argues that the First Amendment provided an absolute privilege to the newspaper in *McNamara*. Compare *Shulman v Group W Production Inc*, 18 Cal 4th 200, 233.

⁴⁸⁸ See also J Rosen, ‘Continental Divide’ [2004] *Legal Affairs* 49, 53 who dimly senses that ‘[i]n the name of hono[u]r, Europeans are even willing to tolerate restrictions on freedom of the media, restrictions American courts would never accept.’ In the European context, it is irrelevant what ‘the courts would accept.’ Instead, courts have to consider whether or not an individual claim, based on a right to privacy, is justified in the light of the media’s right to free speech and the public’s right to know.

⁴⁸⁹ A L Peikoff, for instance, mentions that ‘thanks to the right to privacy, Americans enjoy privacy not by right, but by permission’ - ‘The Right to Privacy: Contemporary Reductionists and their Critics’ (2006) 13 *Virginia Journal of Social Policy and the Law* 474, 489.

time,⁴⁹⁰ it would consequently be more appropriate to understand this as indicating that the readiness of the courts to grant these permissions has shrunk. Notwithstanding, the notion of law as commands quite literally suits the top-down approach on privacy taken in that country.⁴⁹¹ The difference of adopting an alternative rights-based approach will be shown next.

2.3.3 Towards a right to a 'right of privacy'

As the title of their law review article already suggests, Warren and Brandeis' conceptual basis for their proposal was that of a 'right.'⁴⁹² In my opinion, this still the best way in the present context since extra-contractual liability is most easily imposed on the basis of the invasion of an individual right. It would also clarify the status of the interest pitted against freedom of speech. It has already been indicated and will receive detailed discussion later on that the New Zealand courts may recognise a right to privacy under the heading of s 28 NZBoRA.⁴⁹³ Moreover, the recent acknowledgment of an 'intrusion into seclusion tort' on a comparable basis by the Ontario Superior Court of Justice also lends support to proceed in this manner.⁴⁹⁴ At least in the context of English law, however, it might be necessary to recognise an autonomous 'right of privacy' in common law. This would also suit the tort structure preferred here – there would be a private right whose infringement gives rise to a cause of action.

⁴⁹⁰ Eg, A J McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *North Carolina Law Review* 989, 995.

⁴⁹¹ See also C R Sunstein, 'On Analogical Reasoning' (1993) 106 *Harvard Law Review* 741, 749.

⁴⁹² W Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769, 778 - Leebron points out that the language was deliberately chosen as the authors could have named the article "The Legal Protection of Privacy, Invasion of Privacy" or similarly. As already shown, Prosser very much dismantled Warren and Brandeis' original intentions – see, eg, H Kalven, Jr, 'Privacy in Tort Law-Were Warren and Brandeis Wrong?' (1966) 31 *Law and Contemporary Problems* 326, 333 – Kalven discusses Bloustein's effort to ground privacy on a single principle and observes 'the deadening common sense of the Prosser approach [that] cuts the tort loose from the philosophic moorings Warren and Brandeis gave it, from, that is, the excitement of association with the grand norm of privacy'.

⁴⁹³ This would represent a liberty-based normative foundation of the right – See J L Coleman and J Kraus, 'Rethinking the Theory of Legal Rights' (1986) 95 *Yale Law Journal* 1335, 1340-1.

⁴⁹⁴ *Somwar v McDonald's Restaurants of Canada Ltd* 263 DLR (4th) 752 paras 23-31; *Shred-Tech Corp v Viveen* [2006] OJ No 4893 para 30 - Gordon J was 'of the view recognition of such a tort in law is the logical result of the acknowledgment of privacy rights. There must be a remedy available for the breach of any right').

What would be the implication of granting a ‘right’ of privacy as distinct from the court’s ‘permission’ to retain privacy to a certain extent?⁴⁹⁵ Is the joint judgment’s assertion swiftly mentioned in *Hosking* true that in theory ‘a rights-based cause of action would be made out by proof of breach of the right irrespective of the seriousness of the breach’?⁴⁹⁶ On the face of it, the simplicity of the argument is certainly stunning but which theory had their Honours’ in mind when they made this rigorous claim?⁴⁹⁷ Whatever gave them that idea, does their assumption represent the only arguable concept of right?⁴⁹⁸ This large issue cannot be canvassed exhaustively here. However, we consider two different formulations.⁴⁹⁹ The chief purpose of the following exposition is to counteract against the apparently widespread impression that a rights-based conflict (for instance between privacy and freedom of speech) ‘virtually begs for an either/or solution’⁵⁰⁰ as indicated in *Hosking*. The following works towards a ‘bottom-up’ approach that I associate with a tort consistent with a human rights instrument. In such an approach, as Weinrib put it somewhat enigmatically, the ‘plaintiff and the defendant are locked in a reciprocal normative embrace.’⁵⁰¹ This formulation nevertheless alludes to an uncompromising ‘corrective justice’ approach. It is, thus, advantageous to point out that our analysis proceeds on the premise that ‘[c]orrective justice specifies grounds,

⁴⁹⁵ The advent of, for instance, an ‘age of rights’ could be observed quite regularly these days - see, eg, T Poole, ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23 *Oxford Journal of Legal Studies* 435, 438. One may nonetheless have the impression that the implications of a right are like a red rag to a bull to some judges and scholars. Hence, a short discussion seems advantageous – compare, eg, M Richardson, ‘Whither Breach of Confidence: A Right of Privacy for Australia?’ (2002) 26 *Melbourne University Law Review* 381, 392 where the author discusses Mill’s political philosophy and remarks ‘[c]ertainly, Mill took rights seriously [...]’ obviously paraphrasing Dworkin, with M Richardson and L Hitchens, ‘Celebrity privacy and benefits of simple history’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 250, 262 discussing Mill and sensing a ‘rich potential base of utilitarian support for privacy as a species of liberty.’

⁴⁹⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 125 per Gault P and Blanchard J. For a similar suggestion see P A LeBel, ‘The Right to Privacy One Hundred Years Later: Rights-Talk and Torts-Talk’ (1991) 41 *Case Western Reserve Law Review* 811, 818.

⁴⁹⁷ It could be a will-based theory of rights, which is said to ‘regard rights as spheres of liberty bounded by absolute rules’ – see L R Meyer, ‘Unruly Rights’ (2000) 22 *Cardozo Law Review* 1, 7; the statement also fits Dworkin’s ‘rights as trumps’ account – see M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 592.

⁴⁹⁸ Particularly the notion of ‘rights as trumps’ was given ‘wide currency’ by Dworkin - J Raz, *The Morality of Freedom* (OUP, 1986) 186.

⁴⁹⁹ A consensus about the proper conception of a ‘right’ indeed does not seem to exist - J Waldron, *Liberal Rights* (1993) 203.

⁵⁰⁰ P A LeBel, ‘The Right to Privacy One Hundred Years Later: Rights-Talk and Torts-Talk’ (1991) 41 *Case Western Reserve Law Review* 811, 816.

⁵⁰¹ E J Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, 512; W N R Lucy, *Philosophy of Private Law* (2007) 379.

not modes, of rectification.’⁵⁰² In Aristotle’s treatise ‘Justice and Injustice,’⁵⁰³ the famous distinction between ‘corrective justice’ and ‘distributive justice’ was first made. Although this is obviously another complex issue which cannot be dealt with exhaustively in a comparative law analysis, a brief account on the distinction will be provided. We will see later that particularly the ‘highly offensive to a reasonable person’ test contains elements of distributive justice. For our purposes, corrective and distributive justice is therefore not incompatible, but may overlap and even co-exist.⁵⁰⁴

2.3.3.1 Warren and Brandeis and the ‘inviolate personality’

In terms of Warren and Brandeis’ ‘inviolate personality,’⁵⁰⁵ for example, the answer would have been quite simple.⁵⁰⁶ The two authors used this phrase particularly in order to clarify the distinctiveness of privacy in contrast to property interests.⁵⁰⁷ Before Prosser gradually cemented his quadripartite tort, Leon Green proposed to rephrase the cases developing under the privacy label as ‘appropriation of an interest in personality.’⁵⁰⁸ ‘Personality essentially involves the capacity for rights;’ on the most basic level, these abstract rights empower the individual ‘to *be a person*’ which necessarily corresponds with the requirement ‘to *respect others as persons*.’⁵⁰⁹ This statement implies an interrelationship between right and obligation among citizens.⁵¹⁰

⁵⁰² J L Coleman, ‘The Mixed Conception of Corrective Justice’ (1992) 77 *Iowa Law Review* 427, 432.

⁵⁰³ Aristotle, *Nicomachean Ethics*, Book Five. In the following, references Aristotle’s treatise stem from *Selections from Nicomachean Ethics and Politics* (The Collector’s Library of Essential Thinkers, 2004) pp 72 - 96.

⁵⁰⁴ See W N R Lucy, *Philosophy of Private Law* (2007) 379.

⁵⁰⁵ S D Warren and L D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193, 205; see also J Q Whitman, ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (2004) 113 *Yale Law Journal* 1151, 1180.

⁵⁰⁶ Some courts have regarded privacy as the ‘right to be let alone’ as well as the ‘right to an inviolate personality’ – see *Jaubert v Crowley Post-Signal Inc*, 375 So 2d 1386, 1388 (1979).

⁵⁰⁷ J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 391. The characterisation of privacy as a property interest crops up regularly – see, eg, A Schreiber, ‘Confidence Crisis, Privacy Phobia: Why Invasion of Privacy Should Independently recognised in English Law’ [2006] *Intellectual Property Quarterly* 160, 180.

⁵⁰⁸ L Green, ‘The Right of Privacy’ (1932) 27 *Illinois Law Review* 237, 254.

⁵⁰⁹ G W F Hegel, *Elements of the Philosophy of Right* (A W Wood ed; H B Nisbet trans, CUP 1991) § 36 at p 69 (emphasis added). This definition of an abstract ‘right’ seems to be in tune with some contemporary definitions of ‘dignity’ and ‘right’ – see J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 382.

⁵¹⁰ At its core, the categorical right in a Kantian sense is ‘a right to expect civility from others’ – L R Meyer, ‘Unruly Rights’ (2000) 22 *Cardozo Law Review* 1, 12; see also C Fried, ‘Privacy’ (1968) 77 *Yale Law Journal* 475, 478-9; G P Fletcher, ‘The Right and the Reasonable’ (1985) 98 *Harvard Law Review* 949, 966.

In German law, for example, the normative concept of personality entails, for instance, a right to a name or likeness that may be misappropriated as in *Douglas v Hello! Ltd*, a right to privacy which may have been breached in *Shulman v Group W*, or an earned reputation that may be defamed as in *Lange v Atkinson*.⁵¹¹ All cases are then treated alike inasmuch as the individuals involved have at least the abstract right to ‘be a person’ (for example, plaintiff) and the corresponding obligation to ‘respect others as persons’ (for example, defendant).⁵¹² On this note, Bloustein’s observation that the in-violate personality posits ‘the individual’s independence, dignity and integrity [and] define[s] man’s essence as a unique and self-determining being’ was apparently quite close to Warren’s and Brandeis’ original intention.⁵¹³ In a way, Bloustein tried to turn back the clock.

Similarly, New Zealand, England and Wales have started with a protection of privacy and seem to press interests under this headline which are perhaps more appropriately put under the headline of personality or an interest in one’s personhood.⁵¹⁴ In England and Wales, for instance, it seemed for a while as if privacy conceptualised as ‘dissemination of personal information’ was becoming a surrogate for personality in the *Douglas v Hello! Ltd* litigation.⁵¹⁵ The situation was clarified recently in the House of

⁵¹¹ His Honour would certainly not like the idea, but for a quite ‘German’ reconciliation of the two interests see *Lange v Atkinson* [1998] 3 NZLR 424, 473 (CA) per Tipping J. In a similar manner, Leon Green thought that privacy is only one of several aspects of personality - ‘The Right of Privacy’ (1932) 27 *Illinois Law Review* 237, 239.

⁵¹² See also E J Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice’ (2001) 2 *Theoretical Inquiries in Law* 107, 126 who argues that correlativity represents the interrelation of the parties while personality ‘represents the parties in their interrelation’ (emphasis added).

⁵¹³ E J Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 *New York University Law Review* 962, 971.

⁵¹⁴ It should be added that the ECtHR implies the ‘development of every human being’s personality’ while using the term ‘private life’ of art 8 ECHR - *von Hannover v Germany* (2005) 40 EHRR 1 para 69; see also H T Gómez-Arostegui, ‘Defining Private Life Under The European Convention on Human Rights by Referring to Reasonable Expectations’ (2005) 35 *California Western International Law Journal* 153, 160.

⁵¹⁵ This is hardly a privacy case, but fits into the formulation of the US appropriation of name and likeness tort – R Wacks, ‘Why there will never be an English common law privacy tort’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 154, 157. This tort, however, is widely regarded as not incorporating a privacy interest. For some further details see also S Bains, ‘Personality Rights: Should the UK Grant Celebrities a Proprietary Right in Their Personality?’ (2007) 18 *Entertainment Law Review* 165; see also Note ‘In the Face of Danger: Facial Recognition and the Limits of Privacy Law’ (2007) 120 *Harvard Law Review* 1870, 1876.

Lords.⁵¹⁶ Likewise, one New Zealand decision also seemed to show an interest in conflating personality interests under the privacy banner.⁵¹⁷

Notwithstanding, recognising at least a general ‘right to privacy’ under s 28 NZBoRA in New Zealand could have the advantage of ensuring a limited and principled development of the current remedy affording protection solely against disclosure of personal information. This remedy would only protect an aspect of the right to privacy not privacy as a whole.⁵¹⁸ Thus understood the cause of action would be less vulnerable to treat what is in fact a ‘placing someone in a false light claim’ as a disclosure case. A ‘false light’ claim may or may not be accepted as another actionable aspect of a right to privacy, but it is not encompassed by the current remedy. We will see later that an ‘indirect horizontal application’ of the NZBoRA does not require the courts to manufacture a new cause of action.⁵¹⁹ A right to privacy would (indirectly applied) only grant protection in an already existing remedy. Whether or not such an additional ‘false light’ cause of action should be recognised is, in my view, left to the courts as a matter of common law.⁵²⁰ The exact relationship between common law rights and the rights enshrined in a human rights instrument are beyond the scope of this analysis. However, an indirectly applied quasi-constitutional right would arguably require an autonomous recognition of a right to privacy in the common law as well. As Laws LJ put it in the context of English law:⁵²¹

⁵¹⁶ *Douglas v Hello! Ltd (No 3)* [2007] 2 WLR 920 (HL) paras 118 per Lord Hoffmann; para 255 per Lord Nicholls and para 285 per Lord Walker (dissenting).

⁵¹⁷ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 391 predicts that aspects may be subsumed under ‘privacy’ that do not belong there. In *Mafart v TVNZ Ltd* [2006] 3 NZLR 534 (CA) para 61 per Hammond J - the Court of Appeal opined that ‘misinterpretation or misportrayals’ was an aspect of privacy. This interest is probably best subsumed under the ‘publicity which places the plaintiff in the false light in the public eye’ formulation of the US tort (see J F Burrows, ‘Review: Media Law’ [2006] *New Zealand Law Review* 769, 774), which is a branch of the quadripartite US tort also not protecting ‘privacy’ interests in a narrow sense.

⁵¹⁸ See particularly *Campbell* [2004] 2 All ER 995 (HL) para 15 per Lord Nicholls.

⁵¹⁹ *Ibid*, para 132 per Lady Hale.

⁵²⁰ See generally Lord Irvine of Lairg, Hansard, HL Volume 583, 24 November 1997, col 785 (‘In my view, the courts may not act as legislators and grant new remedies for infringement of convention rights unless the common law itself enables them to develop new rights or remedies’ – emphasis supplied). See also M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 paras 184, 204.

⁵²¹ *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 para 71 (emphasis supplied).

[t]he common law has come to recognize *and endorse* the notion of constitutional, or fundamental rights. These are broadly the rights given expression in the Convention for the Protection of Human Rights and Fundamental Freedoms, but *their recognition in the common law is autonomous* [...]. The Human Rights Act 1998 [...] now provides a *democratic underpinning* to the *common law's acceptance of constitutional rights*, and important new procedural measures for their protection.

A right to privacy recognised in the common law would therefore be a private right whose infringement might give rise to additional remedies. I perceive a right, thus, as an incentive to protect privacy meaningfully - not as a threat to freedom of speech. Moreover, it is, I think, difficult to distinguish 'personality' understood as a basic normative concept from the central idea embodied in Lord Atkin's neighbour principle. However, rejecting the notion of an 'inviolable personality' as a viable concept is in the author's view perfectly arguable due to its speculative basis. To argue, by way of illustration, 'the inherent difficulty with the Kantian approach, if applied rigorously (as the United States experience has shown) - that is, the risk of a worryingly narrow protection being accorded to privacy interests under the aegis of a strictly framed privacy right',⁵²² is another matter though. Only a remarkably fertile imagination would allow such an observation; the lack of similarities of the actual public dissemination tort with one of Warren and Brandeis' original influences are rather obvious. The plaintiffs have, as already indicated, no 'right' in Holmesian tort theory particularly not in a Kantian sense. In Holmes tort theory, judges exclusively create obligations. Tort law could therefore 'not be described as reflecting or enforcing moral or conventionally-recognized duties owed by one citizen to another.'⁵²³

The paraplegic plaintiff in *Shulman*, for instance, was not 'a person' with a concomitant right to privacy and she was not treated as such. She was treated as a means to a news item as an end, an object on which the function of some 'claws of life' and the

⁵²² M Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26 *Melbourne University Law Review* 381, 394. The position probably has been readjusted – see M Richardson and L Hitchens in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 250, 262 fn 67.

⁵²³ J C Goldberg and B C Zipursky, 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733, 1756.

daily goings about of ‘nurse Carnahan’ were to be shown.⁵²⁴ It is furthermore difficult to determine why the conduct of the media in cases such as *Shulman* should be treated differently from the often-condemned up-skirt photography.⁵²⁵ However, whether or not this is indeed a ‘civilized and humane society’⁵²⁶ is not for the author to decide but it might be in doubtful taste calling this a Kantian approach.⁵²⁷ In conclusion, there is effectively nothing left of Warren’s and Brandeis’ famous article – apart from the already mentioned disregard for the human dignity, the original intention of implementing a ‘right to privacy’ has also not taken root in US law.⁵²⁸ Before I attempt to espouse an alternative view of the nature and structure of rights, the difference between corrective and distributive justice will be sketched briefly.

2.3.3.2 *Corrective and distributive justice*

According to Aristotle, two particular forms of justice and the just in them can be distinguished – corrective and distributive justice.⁵²⁹ Corrective justice is agent specific and aims at ensuring equality between two particular agents in either voluntary transactions (such as contractual relationships) or involuntary transactions (such as tortious wrongdoing). In the context of tort law, this form of justice is therefore concerned

⁵²⁴ *Shulman v Group W Production Inc*, 18 Cal 4th 200, 228-9 (1998) – the Court determined newsworthiness by way of emphasising the public interest in the rescue proceedings (the ‘claws of life’ were a special tool with which the plaintiffs were extricated) and the medical team with a particular focus on ‘nurse Carnahan’. An interpretation of the means/end distinction could be found in J Rawls, *A Theory of Justice* (OUP, 1971) 179-83. See also J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 382; L E Rothenberg, ‘Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space’ (2000) 49 *American University Law Review* 1127, 1137.

⁵²⁵ Compare K M Beasley, ‘Up-Skirt and other Dirt: Why Cell Phone Cameras and other Technologies Require a New Approach to Protecting Personal Privacy in Public Places’ (2006) 31 *Southern Illinois University Law Journal* 69, 82.

⁵²⁶ *Florida Star v B.J.F.*, 491 US 524, 547 (1989). According to A Margalit, *The Decent Society* (1996) 201 – as cited by J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 398 – a civilised society ‘is one whose members do not humiliate one another, while a decent society is one in which the institutions do not humiliate people.’

⁵²⁷ But compare an earlier work of J Rosen, ‘The Purposes of Privacy: A Response’ (2001) 89 *Georgetown Law Journal* 2117, 2128 who argues, ‘American law is better equipped to adjudicate serious offense[c]es against dignity [as opposed to European law which allegedly focuses on the protection of ‘honour’]’ which is in Rosen’s opinion particularly evidenced by the fact that ‘the torts of intrusion and offensive public disclosure of private facts ask whether the invasion “would be highly offensive to a reasonable person”.’

⁵²⁸ See also P A LeBel, ‘The Right to Privacy One Hundred Years Later: Rights-Talk and Torts-Talk’ (1991) 41 *Case Western Reserve Law Review* 811. See also S K Sandeen, ‘Relative Privacy: What Privacy Advocates Can Learn from Trade Secret Law’ [2006] *Michigan State Law Review* 667, 668-9.

⁵²⁹ Aristotle, *Nicomachean Ethics*, Book Five, at p 78.

with the bipolar relationship between plaintiff and defendant.⁵³⁰ If a person steals NZ\$ 50.00 from another person, equality is restored in this bipolar relationship by repaying the exact amount taken. In this context, the particular features of the two parties involved in such an involuntary transaction are not relevant. It does not matter, for instance, whether the money was stolen from a rich or a poor person. In other words, it is not determinative what the particular merits of each claim are. In terms of corrective justice, it is ‘wrong’ to steal the money in both cases.

Distributive justice, in contrast, is agent general and concerned with the distribution of wealth or other things that are to be shared ‘among the members of the social community.’⁵³¹ The principle of distributive justice is *proportionality*: that ‘which is to be distributed should be so distributed in proportion to the merit of the individuals among whom it is to be distributed.’⁵³² The just (and therefore equal) in distributive justice is thus concerned with merit; it involves comparing the merits of the claims of potential parties to the distribution in terms of a distributive criterion (such as proportionality).⁵³³ In this respect, the relative merit of a poor person’s claim may be compared with the merits of a rich person’s claim. In brief, ‘the kind of equality to which corrective justice restores the parties is thus an abstract one, as the parties are abstracted from their particular features that are relevant in claims of distributive justice.’⁵³⁴

Unfortunately, the importance of the role of distributive justice within tort rules is not fully clarified yet; the reason is most likely that the relevant literature is pitched at a high level of abstraction.⁵³⁵ However, it would appear that both forms of justice are incompatible. As already indicated, we will nevertheless utilise Jule Coleman’s ‘mixed

⁵³⁰ E J Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice’ (2001) 2 *Theoretical Inquiries in Law* 107, 110; see too his ‘Corrective Justice’ (1992) 77 *Iowa Law Review* 403, 409.

⁵³¹ Aristotle, *Nicomachean Ethics*, Book Five, at p 78.

⁵³² N A Weston, ‘The Metaphysics of Modern Tort Theory’ (1994) 28 *Valparaiso University Law Review* 919, 989; Aristotle, *Nicomachean Ethics*, Book Five, at p 81.

⁵³³ See E J Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice’ (2001) 2 *Theoretical Inquiries in Law* 107, 117.

⁵³⁴ N A Weston, ‘The Metaphysics of Modern Tort Theory’ (1994) 28 *Valparaiso University Law Review* 919, 990.

⁵³⁵ P Cane, ‘Distributive Justice and Tort Law’ [2001] *New Zealand Law Review* 401, 419.

conception of corrective justice.’ This approach implies that both forms of justice may at least co-exist.

2.3.3.3 *Right to privacy - a fresh start*

The meaning or theoretical basis of a common law ‘right’ can be manifold and we will consider a fairly recent formulation next. With Raz one could argue, ‘X has a “right” if and only if [...] an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.’⁵³⁶ The difference between the formulations seems to be that the individual does not have certain rights qua being (Hegel) but merely under particular circumstances if individual interests suffice to hold another person under an obligation or duty (Raz).⁵³⁷ However, an obvious conflict exists as to how an interest theory of rights could be reconciled with the claim that privacy is an interest grounded in human dignity.⁵³⁸ In a strict sense, interest theories of rights are independent of human agency, but a solution to this important issue is outside the scope of a comparative law analysis.⁵³⁹

These caveats notwithstanding, Raz’s formulation is best suited for our purposes, because it presupposes that two rights (such as privacy and freedom of speech) can conflict and on occasion only prevail to a degree. This necessarily implies that they are not ‘absolutes.’⁵⁴⁰ It is therefore easily possible to associate this theory with the

⁵³⁶ J Raz, *The Morality of Freedom* (OUP, 1986) 166. It seems as if in the ‘rights-free’ common law sphere, automatic preference is often afforded to a ‘right’ over the corresponding ‘obligation’ which is not necessarily the case. In mainland European law, for example, a ‘right’ is simply ‘subjective law’ (eg, *subjektives Recht* or *droit subjectif*) as distinct from ‘objective law’ (eg, *objektives Recht* or *droit objectif*) - H Kelsen, *Pure Theory of Law* (M Knight trans, University of California Press 1967) 125-6. It is only ‘objective law’ if and only insofar as the so-called enjoyment of the ‘subjective law’ corresponds with the ‘obligation’ of another individual to tolerate the enjoyment of the aforementioned right - at p 127.

⁵³⁷ Raz posits a so-called ‘interest theory’ - see H Kelsen, *Pure Theory of Law* (M Knight trans, University of California Press, 1967) 134 for a brief differentiation of a will power theory of ‘right’ (for example Hegel) and interest theories. Interest theories are not grounded in moral agency (like a Kantian will-theory) but base rights claims in common interests we share as humans - L R Meyer, ‘Unruly Rights’ (2000) 22 *Cardozo Law Review* 1, 7.

⁵³⁸ For the importance of ‘agency’ to privacy see M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 144.

⁵³⁹ Even from the specialised literature it is only ascertainable that, for instance, the German model would run both on advanced utilitarianism or core Kantian principles - M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 590 fn 87.

⁵⁴⁰ See J Raz, *The Morality of Freedom* (OUP, 1986) 184; J Waldron, *Liberal Rights* (OUP, 1993) 203. Many US lawyers, by contrast, seem to presuppose that there could be at best only one right in play, a

possibility of balancing countervailing rights.⁵⁴¹ For my money, this is also the best concept of rights to be combined with a proportionality test. Contrary to the belief of the joint judgment in *Hosking*, a rights-based action is on this basis not automatically made out by its breach. The seriousness of the infringement rather has an impact on the gravity of the plaintiff's interest to hold the defendant under an obligation. First and foremost, it is therefore advantageous to distinguish between *prima facie* rights on one hand and rights on the other.⁵⁴²

So what kind of change does a rights-based approach theoretically bring about? In the most basic sense, a *prima facie* right implies that an individual plaintiff (hereinafter Simpkins) may have an interest which might justify demanding something from the individual defendant (hereinafter Hargreaves).⁵⁴³ The individual interest is recognised by law as an actual right if and to the extent Simpkins can hold Hargreaves under an obligation to do or abstain from doing something. Simpkins could, for instance, demand from Hargreaves not to publicly broadcast and thereby disseminate personal information to the extent that no conflicting considerations are of greater weight.⁵⁴⁴ Given that the incident underlying the broadcast occurred, by way of illustration, in a public place it is suggested that the obligation which Hargreaves may owe individually to Simpkins is neither obsolete per se because of third-party-onlookers nor because of anonymous drivers on a highway who could have watched the incident theoretically.⁵⁴⁵ The aforementioned groups may or may not owe similar obligations to Simpkins, but do not at first blush interfere - let alone obliterate - Hargreaves' individual obligations.⁵⁴⁶ In other words, rights tie the litigants together and make their obligations relational.⁵⁴⁷ The

presupposition which facilitates flat legal thinking - G P Fletcher, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949, 979.

⁵⁴¹ See L R Meyer, 'Unruly Rights' (2000) 22 *Cardozo Law Review* 1, 9.

⁵⁴² For brief discussion of 'abstract' or 'prima facie rights' see R M Dworkin, *Law's Empire* (Belknap Harvard, 1986) 293, 295; J Raz, *The Morality of Freedom* (OUP, 1986) 184; G P Fletcher, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949, 978.

⁵⁴³ See also J Raz, *The Morality of Freedom* (OUP, 1986) 183; H Kelsen, *Pure Theory of Law* (M Knight trans, University of California Press 1967) 132.

⁵⁴⁴ *Ibid.*, at p 172.

⁵⁴⁵ See also *Murray v Express Newspapers* [2007] EMLR 583 (Ch) para 26 per Patten J ("Murray").

⁵⁴⁶ Some judges seem to acknowledge this consequence - see *Shulman v Group W Productions Inc*, 18 Cal 4th 200, 246-7 (1998) per Kennard J (concurring). For a brief distinction between such a rights based model and certain utilitarian accounts see J Waldron, *Liberal Rights* (1993) 204.

⁵⁴⁷ Eg, E J Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 *Theoretical Inquiries in Law* 107, 117.

presence of third-party-onlookers may, however, play a part in determining whether Simpkins has ‘sufficient reason’ to hold Hargreaves under an obligation depending on the circumstances.⁵⁴⁸

In order to determine whether or not Simpkins has ‘sufficient reason’ to hold Hargreaves under the obligation not to disseminate personal information about her the particular remedy has to be fashioned in a certain way of course.⁵⁴⁹ Let us assume that a court employs a ‘reasonable expectation of privacy’ test as its first prong.⁵⁵⁰ It is important not to conflate the issues of determining the actionable nature of the personal information involved and the public interest in learning about this information - these are different matters.⁵⁵¹ The reasonable expectation formula merely serves to demarcate a *prima facie* right to privacy.⁵⁵² As such, the test necessarily would have to combine subjective and objective or better normative considerations in order to produce ‘reasonable’ results.⁵⁵³ In my view, the basic structure of the test as originally proposed by Harlan J in *Katz*⁵⁵⁴ can be utilised for present purposes. We assume that Hargreaves intends to disseminate Simpkins’ health problems against her will / without her consent to other people in two constellations.

⁵⁴⁸ Eg, E Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50 *University of Toronto Law Journal* 305, 321 (2000); A J McClurg, ‘Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places’ (1995) 73 *North Carolina Law Review* 989, 1037.

⁵⁴⁹ Even a value judgment ‘should be a principled, structured and transparent exercise’ - *Brooker v Police* [2007] 3 NZLR 91 (SC) para 153 per Thomas J.

⁵⁵⁰ The ECtHR mentioned the test in *Halford v United Kingdom* (1997) 24 EHRR 523 para 45; *PG & JH v United Kingdom* 2001-IX Eur Ct HR 546 para 57; *Peck v UK* (2003) 13 BHRC 669 para 58; *von Hannover v Germany* (2005) 40 EHRR 1 per Mr Justice Zupančič (concurring) (‘The context of criminal procedure and the use of evidence obtained in violation of the reasonable expectation of privacy in Halford do not prevent us from employing the same test in cases such as the one before us’).

⁵⁵¹ See *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) para 112 per Blackburne J. This conflation, however, often seems to happen in applying the US law – see J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ (1996) 55 *Maryland Law Review* 425, 441.

⁵⁵² For a practical example see *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] 3 WLR 289 (CA) para 22 per Clarke MR (“Browne”).

⁵⁵³ See, eg, N A Moreham, ‘Privacy in Public Places’ (2006) 65(3) *Cambridge Law Journal* 606, 617. For the importance of recognising both subjective and objective (in my view normative) considerations in the context of law relating to human dignity see also G Moon and A Allen ‘Dignity Discourse in Discrimination Law: A Better Route to Equality’ (2006) 6 *European Human Rights Law Review* 610, 645 and D Feldman, ‘Human Dignity as a Legal Value: Part 1’ [1999] *Public Law* 682, 686.

⁵⁵⁴ *Katz v United States*, 389 US 347, 361 (1967).

The first constellation is concerned with Simpkins having a cold, which is pretty obvious even in public places because of her constant sneezing and her runny nose. Her subjective expectations should be tested, *inter alia*, against social practices of talking about this issue, which would be a normative consideration. It considers whether the plaintiff *ought* to have a reasonable expectation.⁵⁵⁵ A court would most likely answer in the negative that this particular health problem (although regularly regarded as private) constitutes a ‘sufficient reason’ to hold Hargreaves under an obligation not to disseminate them. That would be one of the costs Simpkins has to pay for living in an organised and civilised society as they say.⁵⁵⁶ Decisive is already ‘the nature of information.’⁵⁵⁷ The test, then, functions as first filter against wholly subjective individual expectations and delimits a *prima facie* right to privacy.⁵⁵⁸ As a result, the case is simply dismissed without any considerations concerned with free speech.⁵⁵⁹ However, in a rights-based approach there is hardly any room for a general rule saying that there is no protection for privacy interests in public places; it rather has to be tested in each case anew whether Simpkins can hold Hargreaves under an obligation or not.⁵⁶⁰

For the second constellation, Simpkins was involved in a car accident. This time her health problems are critical injuries and she was barely conscious and therefore unaware of being surreptitiously filmed at the accident site by Hargreaves. She learns about these circumstances only through the broadcast itself. Here the second purpose of

⁵⁵⁵ See M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 153.

⁵⁵⁶ See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226. This argument is often invoked but at a certain point it rings hollow and provides ‘a cost-free license for irresponsible behavio[u]r’ – See B Ackerman, ‘Tort Law and Communitarism: Where Rights Meet Responsibilities’ (1995) 30 *Wake Forest Law Review* 645, 658. A related argument is concerned with the ‘hypersensitivity’ of certain plaintiffs – see, eg, R Gavison, ‘Too Early for a Requiem: Warren and Brandeis were Right on Privacy v Free Speech’ (1992) 43 *South Carolina Law Review* 437, 465.

⁵⁵⁷ *Hosking* [2005] 1 NZLR 1 (CA) para 249 per Tipping J; see also *McKennitt v Ash* [2006] EMLR 178 (QB) para 58 per Eady J (“McKennitt”).

⁵⁵⁸ See *Browne* [2007] EMLR 19 (QB) para 42 per Eady J; [2007] 3 WLR 289 (CA) para 33 per Clarke MR.

⁵⁵⁹ This would be a ‘popping out for a pint of milk’ case – see *Campbell* [2004] 2 All ER 995 (HL) para 154 per Baroness Hale; *John v Associated Newspapers Ltd* [2006] EMLR 27 (QB) paras 14 -15 per Eady J; *Murray* [2007] EMLR 583 (Ch) para 45 per Patten J. It is therefore not necessary to balance this kind of information against free speech interests – at para 68; see also *McKennitt* [2007] 3 WLR 194 (CA) para 11 per Buxton LJ.

⁵⁶⁰ Although the degree of analogy with cases in which a sufficient reason to hold the defendant under an obligation have been established is certainly important – for a similar consideration in professional negligence see S Todd, ‘Twenty Years of Professional Negligence in New Zealand’ (2005) 21(4) *Professional Negligence* 257, 265. See also *Browne* [2007] 3 WLR 289 (CA) para 33 per Sir Anthony Clarke MR.

objective considerations in determining a ‘reasonable expectation’ becomes obvious. One may have the distinct impression that these considerations are exclusively regarded as a tool to *constrain* subjective expectations of the individual. This is not necessarily so in my respectful view. On occasion, objective considerations have to be made because subjective expectations are simply absent; objective considerations may also *support* an individual claim. This is, for instance, the case if the claimant is barely conscious as in *Shulman* or a small child without her or his own subjective expectation of privacy.⁵⁶¹ The final determination as to whether there had been an unjustified interference and thus a violation of either a right to privacy or free speech is subject to a distinct step, in which both rights are pitted against one another by means of applying a proportionality test.⁵⁶²

Given the historical scepticism of some English lawyers about rights-based reasoning,⁵⁶³ much therefore depends on how these ‘rights’ are conceptualised. In a constitutionalised common law, it is important not to regard rights as ‘socially pre-existing monolithic preserves’ which constitute valid claims regardless of the context.⁵⁶⁴ They are ‘pre-existing’ or fundamental but not monolithic. Rights and obligations are rather primary to the *contents* of the right in question.⁵⁶⁵ The recognition of a right to privacy underlying the privacy cause of action is in my respectful view also not a matter favouring the plaintiff rather than the defendant; it is a matter of perspective – either the tort is fashioned in a ‘bottom up’ manner (which is apparently regarded as automatically fa-

⁵⁶¹ A similar view was taken by Patten J in *Murray* [2007] EMLR 583 (Ch) para 23. Furthermore influential institutions, such as television, may have a strong impact on one’s subjective expectations - S B Spencer, ‘Reasonable Expectations and the Erosion of Privacy’ (2002) 39 *San Diego Law Review* 843, 860 who provides an additional example of a merchant who regularly sells personal information – subjective expectations that personal information is not being sold will diminish over time.

⁵⁶² See, eg, *HRH Prince of Wales v Associated Newspapers Ltd* [2008] EMLR 66 (Ch) para 88 per Blackburne J; *Campbell* [2004] 2 All ER 995 (HL) paras 137, 140 per Baroness Hale; *Murray* [2007] EMLR 583 (Ch) para 22 per Patten J and *Douglas v Hello! Ltd (No 3)* [2006] QB 125 para 82 per Lord Phillips MR.

⁵⁶³ Lord Steyn, ‘Democracy through Law’ [2002] *European Human Rights Law Review* 723, 732. His Lordship mentions, however, that ‘there has been a decisive shift towards a rights based system’ over the last 20 years.

⁵⁶⁴ See L R Meyer, ‘Unruly Rights’ (2000) 22 *Cardozo Law Review* 1, 39.

⁵⁶⁵ See J L Coleman, ‘The Mixed Conception of Corrective Justice’ (1992) 77 *Iowa Law Review* 427, 437.

vouring the plaintiff) or fashioned ‘top-down’ (which is supposed to favour the defendant).⁵⁶⁶

Qualified rights should neither be understood as ‘trumps’ or ‘firewalls’ as Dworkin and Habermas would suggest, nor should rights have priority over the good (as Rawls argued).⁵⁶⁷ With Robert Alexy, we will instead proceed on the basis that ‘rights’ operate as ‘principles.’⁵⁶⁸ In this context, the major difference between ‘principle’ and ‘rule’ is their different *prima facie* character. A rule is not set aside ‘because its background justification does not hold up in the context of a particular case’ whilst the weight of a principle depends on the context of the case; the principle carrying greater weight under the circumstances sets aside the conflicting principle.⁵⁶⁹ It is, of course, different as regards for example the right to a fair trial – these are categorical rule-like rights.⁵⁷⁰ Contrary to the assumption of the joint judgment, the fact that the rights holder is equipped with a *prima facie* right does not mean that she automatically prevails.⁵⁷¹ On the other hand, it does not mean that these rights do not have to be taken seriously by the court. They posit what Alexy calls an ‘ideal ought,’⁵⁷² in essence this means that constitutional rights as principles ‘have [to] be reali[s]ed to the greatest extent possible, given the factual and legal possibilities’ in the light of the principle of proportionality.⁵⁷³ As we will see later, this may require the courts to distinguish certain sets of facts disseminated by the defendant depending on the circumstances of the case. Furthermore, it is important to note that rights, as principles, do not take precedence

⁵⁶⁶ Compare R Tobin, ‘Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand’ (2004) 12 *Tort Law Journal* 95, 106 who argues that Tipping J’s approach may favour the plaintiff rather than the media defendant when contrasted to the joint judgment’s proposition.

⁵⁶⁷ See M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 590.

⁵⁶⁸ R Alexy, ‘Balancing, Constitutional Review, and Representation’ (2005) 3 *International Journal of Constitutional Law* 572, 573.

⁵⁶⁹ M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 578.

⁵⁷⁰ M Kumm, ‘What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement’ at pp 3-4 <<http://www.lsr.nelco.org/nyu/plltwp/papers/46> at 08 February 2008>.

⁵⁷¹ See, eg, J Raz, *The Morality of Freedom* (OUP, 1986) 184 (‘A general right is, therefore only a *prima facie* ground for the particular right in the circumstances to which it applies’).

⁵⁷² R Alexy, *A Theory of Constitutional Rights* (J Rivers trans, OUP, 2002) 60 as cited by M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 577.

⁵⁷³ R Alexy, ‘Balancing, Constitutional Review, and Representation’ (2005) 3 *International Journal of Constitutional Law* 572, 572-3.

over one another; they do not even take priority ‘over countervailing considerations of policy.’⁵⁷⁴

Translating this into tort theory, it means that we are not dealing with a pure corrective justice approach. Uncompromising conceptions of corrective justice reject ‘one-sided considerations’ (such as policy) affecting only one of the two parties.⁵⁷⁵ With regard to a ‘constitutionalised common law tort,’ it seems reasonable to suggest that we are confronted with a mixed conception of corrective and distributive justice.

An interference with a ‘reasonable expectation of privacy’ marks the infringement of a right to privacy. In terms of tort law, this would represent a civil wrong. However, this infringement or wrong does not constitute the content of the right and therefore not the content of the defendant’s obligation.⁵⁷⁶ The subsequently applied proportionality test rather defines whether this interference constitutes an actual violation of the right in question. Such a definitive violation occurs insofar as an interference with the *prima facie* right is not fully justified in the light of the countervailing principle or policy considerations.⁵⁷⁷ Borrowing Coleman’s phrase from tort theory, this second step determines whether the plaintiff suffers a ‘wrongful loss’ of privacy.⁵⁷⁸

With regard to freedom of speech, it is important to stress that it does not operate primarily as a systemic value as is the case in the USA. It is an important right in a framework of rights. The right of, for instance, the media to disseminate information is coupled with the ‘right’ of the public to impart information – even though they may be personal in nature. To be pitted against these interests in freedom of speech is an indi-

⁵⁷⁴ M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 582. Compare R M Dworkin, *Taking Rights Seriously* (Duckworth, 1978) 194 (‘In order to save [rights], we must recognize as competing rights only the rights of other members of society as individuals’).

⁵⁷⁵ E J Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice’ (2001) 2 *Theoretical Inquiries in Law* 107, 130.

⁵⁷⁶ See J L Coleman, ‘The Mixed Conception of Corrective Justice’ (1992) 77 *Iowa Law Review* 427, 444; see also his ‘Tort Law and the Demands of Corrective Justice’ (1992) 67 *Indiana Law Review* 349, 369-70.

⁵⁷⁷ M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 579.

⁵⁷⁸ See J L Coleman, ‘The Mixed Conception of Corrective Justice’ (1992) 77 *Iowa Law Review* 427, 434.

vidual interest to keeping personal information away from the public gaze – even though there might be a ‘public interest’ of some kind in learning about these matters. An interference with a *prima facie* right to freedom of speech, like an interference with most constitutional rights, simply leads to an assessment as to whether the interference is justified.⁵⁷⁹ Particularly the application of a proportionality test requires determining when and to which extent (not if at all) one of the interests involved overrides the other.⁵⁸⁰ The systemic value of freedom of speech for a democratic society is embodied in the fact that it is, for instance, more difficult to justify limitations on political speech than on commercial speech. We will return to these matters during the discussion of the law of the UK law and New Zealand’s tort.

2.3.4 Conclusion

The 1990s saw a revived interest in both constitutional and tort theory.⁵⁸¹ In New Zealand and England, new privacy remedies have been added to common law and equity recently. Furthermore, each remedy is supposed to be consistent with quasi-constitutional human rights instruments. Both strands of theory are therefore relevant in this context.

It seems, however, as if only the development of theoretical privacy concepts has received a considerable amount of scholarly attention. Our analysis is much narrower in focus and in the preceding section, we have paid closer attention to the detail that we are also dealing with a ‘privacy *tort*.’ To my mind, the implications of this fact are equally important and deserving of attention but are usually neglected. The fixation on privacy may lead to peculiar results. It sometimes seems as if every problem occurring in this context is associated with the newly protected privacy interest and its interpretation. A good example is the protection of privacy interests in public places, which, as I have attempted to show, does not have necessarily anything to do with a particular concept of privacy.

⁵⁷⁹ It should be reiterated that, for instance, the right to life or a fair trial are not at issue here.

⁵⁸⁰ See M Kumm, ‘What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement’ at p 5 <<http://www.lsr.nelco.org/nyu/plltwp/papers/46> at 08 February 2008>.

⁵⁸¹ For the revived interest in constitutional theory see generally M Laughlin, ‘Constitutional Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 183.

At the outset, we have noted that there are two relevant ways of determining tort liability. The first is represented by American tort law and vests plaintiffs with a right to take action while a right to compensation is conferred by making out the action. There is no individual right to privacy in common law. Recovery is determined by command with regard to social goals lying outside tort law itself. This means, *inter alia*, that the courts do not permit liability given that ‘clearly private’ personal information about the plaintiff had been gathered in a public place. This phenomenon, for example, has in my respectful view nothing to do with any particular concept of privacy. It is rather part of a general conception of tort law emphasising the liberty interests of the defendant.

We have attempted to contrast this approach with an alternative based on an individual right to privacy. In this second model of determining tort liability, the defendant infringes an individual right of the plaintiff which in turn gives rise to a cause of action. The notion of rights certainly puts some common lawyers off, but it is important to note that most tort theorists following the justice tradition develop their conceptions around the dichotomy of right and correlative duty or obligation. In other words, there is an emerging consensus to the effect that corrective justice has an important role to play in modern tort theory.⁵⁸² The joint judgment in *Hosking* arguably assumed that such an approach would lead to successful privacy claims regardless of the seriousness of the interference.⁵⁸³ We have tried to contrast this view particularly by help of ‘Simpkins and Hargreaves.’ Such a concept constrains the ambit of individual rights particularly by acknowledging that two rights may conflict.⁵⁸⁴ An approach initially based on corrective justice has in turn important implications for the protection of privacy interests in public places, which could be regarded as the litmus test of a rights-based approach. Rights make obligations relational. Contrary to the situation in the USA, the tort law wrong is not against the world at large but against the injured plain-

⁵⁸² See E J Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice’ (2001) 2 *Theoretical Inquiries in Law* 107, 109.

⁵⁸³ *Hosking* [2005] 1 NZLR 1 (CA) para 125.

⁵⁸⁴ See also N Jansen, ‘Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability’ (2004) 24 *Oxford Journal of Legal Studies* 443, 461; G P Fletcher, ‘The Right and the Reasonable’ (1985) 98 *Harvard Law Review* 949, 966.

tiff.⁵⁸⁵ The categorical question as to whether or not individuals may restrict further dissemination of personal information gathered in public places does not occur. Instead, it is, for instance according to Raz's concept of rights, more appropriate to ask whether the plaintiff's interest justifies holding the defendant under the obligation not to disseminate (or further disseminate) the disputed information in the particular circumstances. Recognising the correlation of right and obligation may in turn also open up the opportunity to implement a concept of privacy.

A tort based on corrective justice alone is impractical though. I suggest that 'corrective justice specifies grounds, not modes, of rectification.'⁵⁸⁶ A realistic account would also contain elements of distributive justice, which may be provided by a (quasi-) constitutional framework. As we have noted, the principle of distributive justice is proportionality. Tort theory is pitched at a regrettably high level of abstraction, but a 'mixed conception of corrective justice' distinguishing between 'wrong' and 'wrongful loss' seems to accord with the distinction between 'infringement' and 'violation' of constitutional rights. As I understand it, particularly the law of England and Wales could easily develop into such an approach.⁵⁸⁷ This approach would be consistent with a modern human rights instrument and would incidentally represent a very modern approach to the law of torts.

2.4 Publicity and the impact of 'special relationships'

We will now return to the US tort. The next prerequisite requires the plaintiff to show that the defendant gave 'publicity' to the personal information in dispute.⁵⁸⁸ The purpose of this requirement still seems unclear.⁵⁸⁹ It is most likely for this reason that

⁵⁸⁵ See E J Weinrib, 'Understanding Tort Law' (1989) 23 *Valparaiso University Law Review* 485, 513.

⁵⁸⁶ J L Coleman, 'The Mixed Conception of Corrective Justice' (1992) 77 *Iowa Law Review* 427, 432.

⁵⁸⁷ See *Browne* [2007] EMLR 19 (QB) para 40 per Eady J.

⁵⁸⁸ This issue is often the crux of this branch of the privacy tort – L M Jennings, 'Paying the Price for Privacy: Using the Private Facts Tort to Control Social Security Number Dissemination and the Risk of Identity Theft' (2004) 43 *Washburn Law Journal* 725, 733.

⁵⁸⁹ Prosser opined that the 'publicity' element was 'fairly marked out' (W L Prosser, *The Law of Torts* (4th ed, 1971) 810) but does not offer an analytical explanation why this is the case. Compare W L Prosser and W P Keeton (ed), *Prosser and Keeton on Torts* (5th ed, 1984) 857 ('[t]here is considerable doubt about the necessity for a public disclosure').

the courts have been unsure as to whether they should follow the Restatement by enforcing a strict publicity requirement.⁵⁹⁰

‘Publicity’ has to be distinguished from ‘publication’, which is a prerequisite of defamation.⁵⁹¹ Whereas ‘publication’ denotes communicating facts to at least one other person, ‘publicity’ requires the dissemination of facts to a group of people; the difference could be described as one between private and public communication.⁵⁹² Publicity or public communication in the strict sense ‘means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge’; it does not normally constitute an actionable invasion of privacy if the defendant ‘communicate[s] a fact concerning the plaintiff’s private life to a single person or even to a small group of persons.’⁵⁹³ Hence, some suggest that privacy in the context of the public disclosure tort can only exist as opposed to knowledge of society.⁵⁹⁴

To put it more intelligibly, however, it might be easier to think of the publicity test as an externally observed strict ‘liability rule’ which has to be satisfied regardless of other facts of the case such as the harm done to plaintiff. The courts generally follow

⁵⁹⁰ R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 987. See also *Fernandez Wells v Beauvais*, 983 P 2d 1006, 1009 (1999) – the court observed that ‘the extent of the required publicity to support a claim of public disclosure of private facts varies from jurisdiction to jurisdiction.’

⁵⁹¹ The same distinction is made in New Zealand – see J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.04 at p 759.

⁵⁹² *Virgil v Time Inc*, 527 F 2d 1122, 1126 (1975); *Doe v Methodist Hospital*, 690 NE 2d 681, 692 (1997); *Bodah v Lakeville Motor Express Inc*, 663 NW 2d 550, 554 (2003); D A Elder, ‘Rhode Island Privacy Law - An Overview and some Important Recent Developments’ (1998) 31 *Suffolk University Law Review* 837, 848.

⁵⁹³ § 652 D Restatement (Second) of Torts (1977) comment (a); however, the Restatement also states: ‘While the cases to date allowing recovery for the type of invasion of privacy covered by this Section have been confined to the giving of publicity to the private matter, the courts may decide to extend the coverage to a simple disclosure.’ Compare also *Beaumont v Brown*, 257 NW 2d 522, 531 (1977). In *Ozer v Borquez*, 940 P 2d 371, 378 (1997), the Court conceded that ‘there is no threshold number which constitutes “a large number” of persons.’ See also R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 993.

⁵⁹⁴ J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ (1996) 55 *Maryland Law Review* 425, 437. The reason for this requirement is probably that Warren and Brandeis’ article was predominantly aimed at the mass media whose involvement routinely leads to publicity in this sense - B Moretti, ‘Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation’ (1993) 11 *Cardozo Arts and Entertainment Law Journal* 857, 867; a similar argument for insisting on the strict publicity requirement was expressed in *Bodah v Lakeville Motor Express Inc*, 663 NW 2d 550, 557 (2003).

the formulation of the Restatement⁵⁹⁵ which resembles either ‘slot machine’ adjudication or the application of a ‘command’ determining liability. Elder has observed that the usual application of the Restatement’s formulation has spawned a vast body of ‘knee-jerk and reflexive jurisprudence’; he continues by mentioning, ‘the non-liability rule in cases of limited publication [provides] an irrebuttable presumption that all such disclosures are not entitled to redress - no matter how offensive the communication and despite the absence of any justification for publication thereof to the recipient.’⁵⁹⁶ To this writer, this indicates the absence of a ‘right to privacy.’⁵⁹⁷

In certain areas, predominantly where the media is not involved,⁵⁹⁸ some decisions *do* consider social consequences of limited dissemination however. These decisions therefore might provide a useful source for other common law jurisdictions. In these cases, plaintiffs have established an action based on publicity to a small number of people with whom they shared a ‘special relationship.’⁵⁹⁹ Such a relationship exists if ‘communication was made to a particular public such as employees, club members, church members, family, or neighbo[u]rs.’ The rationale behind the deviation is that even a limited dissemination may ‘be just as devastating as disclosure to the general

⁵⁹⁵ P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 99-100. See also *Doe v State of Washington*, (2007) Westlaw 1476341 at p 11; *Munsell v Hambricht*, 776 NE 2d 1272, 1282 (2002); *Dietz v Finley Fine Jewellery Corp*, 754 NE 2d 958, 966 (2001); *Swinton Creek Nursery v Edisto Farm Credit ACA*, 483 SE 2d 789, 794 (1998); *Bodah v Lakeville Motor Express, Inc.*, 663 NW 2d 550, 554-55 (2003); *Virgil v Time Inc*, 527 F 2d 1122, 1126 (1975); *Fernandez Wells v Beauvais*, 983 P 2d 1006, 1008-9 (1999). Some courts require the communication ‘to a large number of persons, as distinguished from one individual or a few’ - *Ozer v Borquez*, 940 P 2d 371, 377 (1997).

⁵⁹⁶ D A Elder, ‘Rhode Island Privacy Law - An Overview and some Important Recent Developments’ (1998) 31 *Suffolk University Law Review* 837, 849.

⁵⁹⁷ See also *Bodah v Lakeville Motor Express Inc*, 663 NW 2d 550, 557 (2003); L M Jennings, ‘Paying the Price for Privacy: Using the Private Facts Tort to Control Social Security Number Dissemination and the Risk of Identity Theft’ (2004) 43 *Washburn Law Journal* 725, 748.

⁵⁹⁸ B C Murchison, ‘Revisiting the American action for public disclosure of private facts’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 32, 53. The cases mostly involve workplace or health problem related privacy interests.

⁵⁹⁹ *Mc Surely v McClellan*, 753 F 2d 88, 112 (1985); *Duncan v Peterson*, 835 NE 2d 411, 423 (2005); *Wynne v Loyola University of Chicago*, 741 NE 2d 669, 677 (2000); *Olson v Red Cedar Clinic*, 681 NW 2d 306, 309 (2004); P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 100. The courts applying the more liberal standard represent the minority - L M Jennings, ‘Paying the Price for Privacy: Using the Private Facts Tort to Control Social Security Number Dissemination and the Risk of Identity Theft’ (2004) 43 *Washburn Law Journal* 725, 734; R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 987.

public.’⁶⁰⁰ On occasion, even dissemination to one person was held to satisfy the ‘publicity’ requirement.⁶⁰¹ This would, of course, obliterate the initial distinction between ‘publication’ and ‘publicity.’ Given that the recipients have ‘natural and proper interest’ in the disclosure of the plaintiff’s information, however, even a special relationship does not assist the plaintiff’s claim.⁶⁰²

‘[I]n assessing whether the publicity element of an invasion of privacy claim was satisfied’ the courts then examine ‘the *particular facts of the case* together with the *nature of the disclosure* and the *relationships of the individuals involved*.’⁶⁰³ Hence, by focusing on these ‘special relationships’ (rather than the bright line test of the Restatement) the courts examine the context of the case and the sometimes egregious conduct⁶⁰⁴ of the defendants. However, courts that apply the publicity test allegedly more flexibly are in fact ignoring the test of the Restatement since they are ‘focusing not on the *amount* or *extent* of publicity, but instead on whether the disclosure is *unnecessary* or *unreasonable*.’⁶⁰⁵ Other courts have pointed out that reasonableness is not part of the publicity analysis and consequently reaffirmed the strict publicity element of the Restatement.⁶⁰⁶

This is a very significant conflict. Most courts apply what we have addressed as a category (1) strict liability rule and therefore only focus on whether the dissemination

⁶⁰⁰ *Duncan v Peterson*, 835 NE 2d 411, 424 (2005) (emphasis added; internal citations omitted); see also *Miller v Motorola Inc*, 560 NE 2d 900, 903 (1990); *Johnson v K Mart Corp*, 723 NE 2d 1192, 1197 (2000); *Kuczaba v Pollock*, 742 NE 2d 425, 435 (2000); *Munsell v Hambright*, 776 NE 2d 1272, 1282-3 (2002); *Pachowitz v LeDoux*, 666 NW 2d 88, 95 (2003); *Cordts v Chicago Tribune Comp*, 860 NE 2d 444, 450 (2006); *Wynne v Loyola University of Chicago*, 741 NE 2d 669, 677 (2000).

⁶⁰¹ *Johnson v K Mart Corp*, 723 NE 2d 1192, 1197 (2000); *Beaumont v Brown*, 257 NW 2d 522, 529 (1977); *Mc Surely v McClellan*, 753 F 2d 88, 112 (1985).

⁶⁰² *Cordts v Chicago Tribune Comp*, 860 NE 2d 444, 451 (2006). Some courts are aware of the possible circularity that people who share a ‘special relationship’ are also likely to have a ‘natural and proper interest’ in the disclosed personal information. Spouses, by way of illustration have such a relationship, but a wife has a proper interest in knowing her husband’s credit cards debt - at pp 451-2. See also *Roehrborn v Lambert*, 660 NE 2d 180, 183 (1995).

⁶⁰³ *Pachowitz v LeDoux*, 666 NW 2d 88, 95 (2003) (emphasis added); compare *Olson v Red Cedar Clinic*, 681 NW 2d 306, 309 (2004); *Roehrborn v Lambert*, 660 NE 2d 180, 182 (1995); *Shattuck-Owen v Snowbird Corp*, 16 P 3d 555, 559 (2000); *Ozer v Borquez*, 940 P 2d 371, 378 (1997).

⁶⁰⁴ *Ozer v Borquez*, 923 P 2d 166, 173 (1995).

⁶⁰⁵ P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 101; *Ozer v Borquez*, 923 P 2d 166, 174 (1995).

⁶⁰⁶ *Bodah v Lakeville Motor Express Inc*, 663 NW 2d 550, 556 (2003).

reached the public at large and nothing else.⁶⁰⁷ The minority, in contrast, concentrates on whether the dissemination was ‘unreasonable’ in the circumstances and thereby turns the strict liability rule into a genuine category (2) duty or standard.⁶⁰⁸ As we recollect, this also involves a shift of perspective: the focus lies no longer on the conduct of the *defendant* evaluated from an ‘external point of view.’ Instead, the courts take part in the litigation and consider the ‘harm’ done to the plaintiff by means of some form of dissemination. We have associated this approach with the ‘internal point of view.’ In terms of doctrine, this also seems to add a ‘causation’ element to the remedy because the fact that the defendant’s conduct caused harm to the plaintiff is otherwise irrelevant. This would also be in line with the observation that modern American legal thought seems to be conspicuous for its ‘causal minimalism.’⁶⁰⁹

What may be the implications of the minority opinion? Basically, the extended examination of the context blurs at least the line between the ‘publicity’ requisite and the ‘highly offensive to a reasonable person’ test.⁶¹⁰ Robert Post, however, was already able to observe that the recognition of special relationships ‘collapses the publicity test into the “private” facts and “offensiveness” requirements.’⁶¹¹ In other words, given that the courts acknowledge the relevance of relationships in this context, the same full circumstances of the case would have to be evaluated under three different headlines. This in turn seems to prove Weinrib’s thesis that once the *plaintiff’s suffering* is inseparably linked to the *conduct* of the *defendant*, ‘the procedure [the cause of action] is not internally divisible into independent components;’ various aspects of the remedy rather con-

⁶⁰⁷ See above Chapter Two, 2.3.2.3.

⁶⁰⁸ See also J Smillie, ‘Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand’ [1996] *New Zealand Law Review* 254, 257 (‘Judges are often tempted to accommodate [...] a deserving case by recognising an exception to a governing rule, or extending the range of application of a rule, or abandon a rule entirely in favour of a more abstract and uncertain norm which leaves the court more discretion at the point of application’).

⁶⁰⁹ W N R Lucy, *Philosophy of Private Law* (2007) 164; refer to E J Weinrib, ‘Causation and Wrongdoing’ (1987) 63 *Chicago Kent Law Review* 407, 410 for further details. See also A Ripstein, *Equality, Responsibility, and the Law* (1999) 32-35.

⁶¹⁰ In *Bodah v Lakeville Motor Express Inc*, 663 NW 2d 550, 556 (2003) such an argumentation was adopted to justify the application of the strict publicity requirement of the Restatement; see also P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 101.

⁶¹¹ R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 988.

stitute a single whole.⁶¹² By sticking to the strict publicity requirement of the Restatement, most courts keep tests of the tort remedy separate which would otherwise not be clearly separable. To turn the argument on its head, it means that the harm done to the plaintiff is of no concern, which resembles what Weinrib has called ‘ordinary ordering’ of tort law. Ordinary ordering presupposes an assortment of independent tests, which have to be satisfied in order to serve social goals unrelated to tort law and thus an individual case itself.⁶¹³ Moreover, this confirms Duncan Kennedy’s general observation that the ‘wrong’ involved is not the infliction of harm or damage, but the failure to compensate the plaintiff for narrowly confined actions of the defendant.⁶¹⁴

As a result, it is suggested that the US tort, comprised of independent strict liability rules, only functions properly if each of them concentrates on a tightly confined aspect of the whole circumstances of a particular case. This also means that connecting the defendant’s conduct to the harm done to the plaintiff is not feasible in this context.

The recognition of the relationship between plaintiff and certain parts of the audience to which disputed personal facts are disseminated may nonetheless be subject to generalisation.⁶¹⁵ We may distil the minority courts’ observation that the dissemination to a small number of persons can be as devastating for the plaintiff as a ‘public dissemination.’ To require the plaintiff to show a more widespread publicity under these circumstances seems arbitrary.⁶¹⁶ Outside the USA, there seems to be no persuasive reason why this observation should be restricted to ‘non-media’ cases. It might rather have an impact, for instance, on the ‘identification’ of the plaintiff by others.⁶¹⁷ In this re-

⁶¹² E J Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, 511; see also his ‘Causation and Wrongdoing’ (1987) 63 *Chicago Kent Law Review* 407, 410 and C R Sunstein, ‘On Analogical Reasoning’ (1993) 106 *Harvard Law Review* 741, 789.

⁶¹³ E J Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, 495.

⁶¹⁴ D Kennedy, ‘Form and Substance in Private Law Adjudication’ (1975) 89 *Harvard Law Review* 1685, 1694.

⁶¹⁵ US trade secret law for instance analyses the ‘relationships that exist between the trade secret owner and the persons to whom information is disclosed’ - S K Sandeen, ‘Relative Privacy: What Privacy Advocates Can Learn From Trade Secret Law’ [2006] *Michigan State Law Review* 667, 698.

⁶¹⁶ D A Elder, ‘Rhode Island Privacy Law - An Overview and some Important Recent Developments’ (1998) 31 *Suffolk University Law Review* 837, 848. Similar criticisms have been made in New Zealand - U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 252; see also J F Burrows in S Todd (gen ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.04 at p 759-60.

⁶¹⁷ See, eg, E Volokh, ‘Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking about You’ (2000) 52 *Stanford Law Review* 1049, 1092 - Volokh

spect, the concept of a ‘special relationship’ is apparently not fully appreciated. In the academic discussion of negligence theory, it seems to be a product of considering as theory, for example, the coherent Rawlsian concept of the rational individual and thus represents the antithesis to the contemporary concept of economic rationality. A ‘special relationship’ just seems to paraphrase the dichotomy of right and obligation.⁶¹⁸ However ‘Rawlsian coherentism’⁶¹⁹ would not be called coherentism if the notion of ‘special relationships’ could not be utilised for the purposes of the public disclosure tort.⁶²⁰ To my mind, it simply means in its broadest sense that individuals and their relationship with others (as distinct from a faceless cost/benefit relation) move into the centre of litigation.⁶²¹ This may also change the face of litigation itself. For New Zealand, this might after all indicate that the whole context of a particular case is better evaluated in a more streamlined cause of action.

2.5 The ‘highly offensive’ test – a recipe for confusion?

We will now turn to the ‘highly offensive to the reasonable person’ test. The reasonable person is an often-invoked concept in common law. In trying to explain its

interprets *Briscoe v Reader's Digest Association Inc*, 93 Cal Rptr 866 (1971) as saying that Briscoe’s interest in social rehabilitation as follows: ‘people who know Briscoe, [were] the very same group whose ignorance Briscoe seemed *most concerned about preserving*’ – emphasis added). See also R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 990; *Borquez v Ozer*, 923 P 2d 166, 174 (Colo App 1995).

⁶¹⁸ B C Zipursky, ‘Rawls in Tort Theory: Themes and Counter-Themes’ (2004) 72 *Fordham Law Review* 1923, 1927-8 (2004) (‘We are now beginning to ask whether ‘duty’ really does mean something, and if so, what: whether concepts of reasonableness in tort really reduce to economic rationality; whether the concept of a special relationship generating a duty of care is merely shorthand for the idea that liability within certain pockets would be efficacious, or whether it really means what it says; and so on for a variety of concerns relating to reputation, bodily integrity, dignity, deception, and a variety of other interests and obligations’); for an emphasis on human ‘relations’ see also C Fried, ‘Privacy’ (1968) 77 *Yale Law Journal* 475, 481.

⁶¹⁹ Ibid.

⁶²⁰ Invoking parts of Rawls’ work in the context of a ‘constitutionalised’ privacy tort seems appropriate. Rawls attempts to carry ‘to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau and Kant’ – J Rawls, *A Theory of Justice* (OUP, 1971) 11. On the most basic level, a constitutionalised private law means that relationships between private citizens will be treated similarly to the relationship between citizen and state – see also *Brooker v Police* [2007] 3 NZLR 91 (SC) paras 171- 173 per Thomas J.

⁶²¹ See B C Zipursky, ‘Rawls in Tort Theory: Themes and Counter-Themes’ (2004) 72 *Fordham Law Review* 1923, 1927. See also E J Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, 491 (‘The practical relevance of theory is to point to what the positive law of torts ought to be by exhibiting the implications of what tort law already is’).

functioning in the present context, I adopt Arthur Ripstein's account⁶²² because it fits structure and main contours of the reasonable person in tort law generally.⁶²³ In abstract terms, reasonable persons can thus be understood as devices playing an enabling role in balancing one person's interest in 'security' against another's interest in 'liberty' from being held liable.⁶²⁴ In the context of the disclosure tort, this general statement translates into a need of balancing conflicting interests of 'self' and 'society' because a line has to be drawn between 'individual' and 'collective.'⁶²⁵ Daniel Solove quotes the sociologist Barrington Moore who pointed out that 'the need for privacy is a socially created need;' '[w]ithout society there would be no need for privacy.'⁶²⁶

Bearing this in mind, the premise of US law contending that a hermit enjoys 'complete privacy'⁶²⁷ could be regarded as invoking a decoy-target. A hermit's interest in 'security' does not depend upon an exercise balancing his interest in keeping certain personal information private against the 'liberty' of press and society to discuss these aspects. His security interests are ensured by avoiding society altogether. The conflict and therefore the need of balancing interests only occurs if society starts interacting with the hermit and thereby embraces him or her as part of society itself. At the outset, it should thus be noted that what has been addressed as 'complete privacy' is, to this

⁶²² A Ripstein, *Equality, Responsibility, and the Law* (1999). This account is based on the assumption that 'rights and remedies must be defined together' - at p 49 - which accords with both the approach taken by the joint judgment in *Hosking* and the USA.

⁶²³ W N R Lucy, *Philosophy of Private Law* (2007) 407.

⁶²⁴ A Ripstein, *Equality, Responsibility, and the Law* (1999) 6. A similar balancing of interests occurs, eg, in negligence law - see S Todd, 'Twenty Years of Professional Negligence in New Zealand' (2005) 21(4) *Professional Negligence* 257, 265.

⁶²⁵ See M Schadrack, 'Privacy and the Press: A Necessary Tension' (1985) 18 *Loyola of Los Angeles Law Review* 949, 953.

⁶²⁶ D J Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 484 and his 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1104; for a conclusion to the same effect see also J B Mintz, 'The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain' (1996) 55 *Maryland Law Review* 425, 428 and L R Meyer, 'Unruly Rights' (2000) 22 *Cardozo Law Review* 1, 31.

⁶²⁷ § 652D comment c Restatement (Second) of Torts (1977) cited, for instance in *White v Township of Winthrop*, 116 P 3d 1034 (2005); see also W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 396 - in this famous treatise, it is an 'eremite' in the desert who enjoys 'complete privacy;' *Green v Chicago Tribune Comp*, 675 NE 2d 249, 254 (1996). For a recent repetition see N A Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 65 *Law Quarterly Review* 628, 639. However, it has to be noted that loneliness turns, according to Moreham, into privacy if it is desired - at p 637.

writer, beside the point.⁶²⁸ The premise therefore fails to make any headway towards solving the conflict at hand.

However, the test constitutes a twin element of the tort together with the private facts test⁶²⁹ in order to ensure that only the dissemination of highly personal details about one's life is actionable.⁶³⁰ The test has therefore been described as a major limitation on the privacy action.⁶³¹

2.5.1 Character and institutional context of the test

The Restatement addresses the aforementioned conflict of interests as follows: '[t]he protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens.'⁶³² This element of the tort focuses, according to Prosser, 'on something in the nature of a "mores" test.'⁶³³ The test incorporates society's expectations as to what should be protected as private; hence, the plaintiff's individual sensibilities are not determinative.⁶³⁴ As this writer understands them, these suggestions circumscribe that interests in security and liberty are weighed within a representative reasonable person in order to avoid allowing 'the particularities of one person to set the limits of another's liberty.'⁶³⁵ Particularly the offensiveness element may

⁶²⁸ The author agrees with C Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475, 482 who argues that invoking this metaphor means to 'engage in irony.' For a preferable view see also *Hosking* [2005] 1 NZLR 1 (CA) para 264 per Anderson J; M Hickford, 'A Conceptual Approach to Privacy' NZLC MP19 para 74.

⁶²⁹ P J McNulty, 'The Public Disclosure of Private Facts: There is Life after Florida Star' (2001) 50 *Drake Law Review* 93, 102.

⁶³⁰ A Taslitz, 'The Fourth Amendment in the Twenty-First Century: Technology, Privacy and Human Emotions' (2002) 65 *Law and Contemporary Problems* 125, 176.

⁶³¹ A B Vickery, 'Breach of Confidence: An Emerging Tort' (1982) 82 *Columbia Law Review* 1426, 1441.

⁶³² § 652D comment c Restatement (Second) of Torts (1977) (emphasis added).

⁶³³ W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 812 and his 'Privacy' (1960) 48 *California Law Review* 383, 397. See also L R Meyer, 'Unruly Rights' 22 (2000) *Cardozo Law Review* 1, 32 who argues that what is regarded as 'highly offensive' largely depends upon 'social conventions and expectations'; S B Spencer, 'Reasonable Expectations and the Erosion of Privacy' (2002) 39 *San Diego Law Review* 843, 853 and P J McNulty, 'The Public Disclosure of Private Facts: There is Life after Florida Star' (2001) 50 *Drake Law Review* 93, 105.

⁶³⁴ S B Spencer, 'Reasonable Expectations and the Erosion of Privacy' (2002) 39 *San Diego Law Review* 843, 853.

⁶³⁵ A Ripstein, *Equality, Responsibility, and the Law* (1999) 56.

thereby create a sense of ‘fault,’⁶³⁶ but an actual fault standard cannot be inferred from this test.⁶³⁷ Instead, one could argue that it contains elements of distributive justice.⁶³⁸ ‘Fault,’ in this context, should rather be understood as an ‘expression of fair terms of interaction in a world of risks.’⁶³⁹ The plaintiff has to discharge the burden of proof, which may be difficult with regard to mental states.⁶⁴⁰

An important point regarding the institutional context is that this element usually has to be determined by means of a jury verdict;⁶⁴¹ the jury trial in common law suits is constitutionally protected in the USA.⁶⁴² The function of this protection is to delimit governmental oppression through the judicial process.⁶⁴³ Both the ‘highly offensive’ test as well as the newsworthiness element (as outlined in the Restatement) is perhaps better understood with this precondition in mind.⁶⁴⁴ As for US negligence law, it has been observed that the reasonable person ‘gets its content in substantial part from its role in framing a jury consideration of community norms.’⁶⁴⁵ The same is, in the author’s eyes, also valid for the public disclosure tort.⁶⁴⁶ The power of the jury, however, was also a major factor behind the extension of First Amendment protection in the wake

⁶³⁶ R A Smolla, ‘Accounting for the Slow Growth of American Privacy Law’ (2002) 27 *Nova Law Review* 289, 303.

⁶³⁷ D A Elder, ‘Rhode Island Privacy Law - An Overview and some Important Recent Developments’ (1998) 31 *Suffolk University Law Review* 837, 848.

⁶³⁸ Ripstein’s suggestions imply a mixed account of corrective and distributive justice - W N R Lucy, *Philosophy of Private Law* (2007) 407; see generally G C Keating, ‘Reasonableness and Rationality in Negligence Theory’ (1996) 48 *Stanford Law Review* 311, 319.

⁶³⁹ A Ripstein, *Equality, Responsibility, and the Law* (1999) 58.

⁶⁴⁰ See, eg, *Shulman v Group W Production Inc*, 18 Cal 4th 200, 248 (1998) per Chin J (concurring and dissenting); *Doe v State of Washington*, (2007) Westlaw 1476341 at p 11.

⁶⁴¹ *Vassiliades v Garfinkel’s Brooks Bros Inc*, 492 A 2d 580, 588. For New Zealand see also *Andrews v TVNZ Ltd* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 68.

⁶⁴² The Seventh Amendment reads: ‘In Suits at common law, where the value in controversy will exceed twenty dollars, the right of trial by jury will be preserved, and no fact tried by jury, will be otherwise re-examined in any Court of the United States, than according to the rules of the common law.’

⁶⁴³ W C Heffernan, ‘Privacy Rights’ (1995) 29 *Suffolk University Law Review* 737, 753.

⁶⁴⁴ It is difficult to elaborate on the ‘highly offensive’ test. US courts predominantly concentrate on the ‘private fact’ test and the ‘newsworthiness’ element, because they are mostly affected by exceptions mandated by the First Amendment - J Elford, ‘Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort’ (1995) 105 *Yale Law Journal* 727, 730.

⁶⁴⁵ B C Zipursky, ‘Rawls in Tort Theory: Themes and Counter-Themes’ (2004) 72 *Fordham Law Review* 1923, 1938.

⁶⁴⁶ See H Kalven, Jr, ‘Privacy in Tort Law-Were Warren and Brandeis Wrong?’ (1966) 31 *Law and Contemporary Problems* 326, 334 (‘Whatever the success of the reasonable-man standard in negligence cases, in this context it can only mean that the jury will know better than the court what the sensitivities of the day are’).

of *New York Times v Sullivan*.⁶⁴⁷ The underlying concern was that juries might punish certain types (or contents) of speech, a matter to which we return during the discussion of the newsworthiness element. Nowadays, it is more appropriate to say that the jury has to resolve all doubtful cases whilst the test is usually applied by the fact-finder.⁶⁴⁸ As a result, jury-trials are often bypassed with either summary judgments or motions to dismiss.⁶⁴⁹ Most cases therefore never reach a jury in order to avoid a chilling effect on the First Amendment.⁶⁵⁰ One might summarise this development by suggesting that the ‘security’ interests of plaintiffs posed a threat to the ‘liberty’ interests of others - the overall balance therefore had to be recalibrated.⁶⁵¹

However, in order to determine a *prima facie* case, it is said that a court should consider a wide range of factors such as ‘the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as intruder’s motives and objectives, the setting into which he intrudes and the expectations of those whose privacy is invaded.’⁶⁵² Thus understood, the prerequisite would constitute a ‘hybrid test’ bridging the actions of the plaintiff with the defendant’s conduct.⁶⁵³ Here, for once, the relationship between both litigants has to be examined. Furthermore, it is obvious that the

⁶⁴⁷ D A Logan, ‘Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering’ (1997) 83 *Iowa Law Review* 161, 165. See also *Haynes v Alfred A Knopf Inc*, 8 F 3d 1222, 1234 (1993).

⁶⁴⁸ A J McClurg, ‘Bringing Privacy out of the Closet: A Tort Theory for Intrusions in Public Places’ (1995) 73 *North Carolina Law Review* 989, 1005. This resembles the application of the defamation Tort in New Zealand - see D R Knight, “‘I’m Not Gay - Not That There’s Anything Wrong with That!’: Are Unwanted Imputations of Gayness Defamatory?” (2006) 37 *Victoria University of Wellington Law Review* 249, 257.

⁶⁴⁹ See, eg, *Baugh v CBS Inc*, 828 F Supp 745, 752 (1993) for further details.

⁶⁵⁰ *Ibid*, at p 754 - the Court observed that summary disposition ‘has become an approved method of resolving privacy cases, since protracted litigation would have a chilling effect on the exercise of free speech in the public forum’ (internal citation omitted). A related concern is that the jury would be confronted with torts without ‘legal profile’ - A J McClurg, ‘Bringing Privacy out of the Closet: A Tort Theory for Intrusions in Public Places’ (1995) 73 *North Carolina Law Review* 989, 1005.

⁶⁵¹ See also D A Logan, ‘Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering’ (1997) 83 *Iowa Law Review* 161, 167-8; Logan observes that defamation law was relatively stable by the mid-1980s. ‘Stability’ meant, however, that the decisions were predictable, which implied that libel claims were rarely successful - at p 168.

⁶⁵² L R Meyer, ‘Unruly Rights’ (2000) 22 *Cardozo Law Review* 1, 32. But see P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 105 who argues that this is often overlooked by the courts which instead focus on the offensiveness of the disseminated material alone. However, numerous courts indeed engage in evaluating the whole context in the aforementioned sense - see, eg, *Stien v Marriot Ownership Resorts Inc*, 944 P 2d 374, 379 (1997); *Shulman v Group W Production Inc*, 18 Cal 4th 200, 236 (1998) (in the context of the intrusion branch).

⁶⁵³ R A Smolla, ‘Privacy and the First Amendment Right to Gather News’ (1999) 67 *George Washington Law Review* 1097, 1124-5. Smolla’s statement is concerned with the intrusion branch of the tort, but applies, in my view, also to the disclosure tort.

test constitutes a balancing of security and liberty interests. Given that the court has identified a doubtful case, a statement may read as follows: '[b]ecause reasonable people could differ as to these facts, we believe a jury could find the [...] publication highly offensive to a reasonable person.'⁶⁵⁴ The reasonable person test might therefore not be that useful if transplanted into New Zealand's legal system. This question has not been addressed so far, but in the English context, the role of the jury extends only to defamation cases.⁶⁵⁵

Mindful of the fact that the test receives further attention during the discussion of New Zealand's law, this first impression will be illustrated by sketching two broad problems: (1) the determination of actionable personal information by means of applying an additional 'highly offensive' test (as a twin-element) may result in conflicts with equality concerns; and (2) the inherently subjective nature of the privacy interest at stake might lead to unevenness between the claimant's individual experience and that of an objective reasonable person.

2.5.1.1 Equality concerns

The concept of reasonableness generally and the reasonable person in particular express an idea of equality.⁶⁵⁶ The presupposition is that 'all have the same interest in both liberty and security.'⁶⁵⁷ However, this very assumption seems to be questionable in the context of the privacy tort. An illustrative example regarding the first aforementioned problem postulates that exposure to HIV⁶⁵⁸ constitutes a 'clearly private matter.'⁶⁵⁹ Additionally, personal information of this kind has to surpass the 'highly offensive' test. Being confronted with such a case, one US court held that '[t]he disclosure [concerned with an HIV infection of a homosexual plaintiff] would be highly objection-

⁶⁵⁴ *Green v Chicago Tribune Comp*, 675 NE 2d 249, 255 (1996); see also *Johnson v K Mart Corp*, 723 NE 2d 1192, 1197 (2000).

⁶⁵⁵ A T Kenyon and M Richardson, 'New dimensions in privacy: Communications technologies, media practises in law' in A T Kenyon and M Richardson (eds), *New Dimensions in Privacy Law* (2006) 1, 5 fn 22.

⁶⁵⁶ A Ripstein, *Equality, Responsibility, and the Law* (1999) 6-7. The negligence standard, interpreted in a non-instrumentalist way, likewise embodies an idea of formal equality - E J Weinrib, 'Causation and Wrongdoing' (1987) 63 *Chicago Kent Law Review* 407, 428.

⁶⁵⁷ *Ibid*, at p 7.

⁶⁵⁸ Acronym for: Human Immunodeficiency Virus.

⁶⁵⁹ *Ozer v Borquez*, 923 P 2d 166, 172 (1997) with further references.

able to a reasonable person because a strong stigma still attaches to both homosexuality and AIDS.’⁶⁶⁰ Another court stated in a similar context, ‘[i]t *ought not to be*, but [an HIV positive status] quite commonly is, viewed with mistrust or opprobrium’⁶⁶¹ and was therefore regarded as both ‘clearly private’ and (*prima facie*) ‘highly offensive.’ However, it should be reiterated that the information cannot be private as a matter of law given that someone is involved, for example, in a custody battle and admits being gay and HIV positive in court.⁶⁶² Consequences of a more widespread dissemination are irrelevant in that case.

Taken at face value, the arguments brought to bear by the courts are nevertheless persuasive. Some regard AIDS as a curse or even construe it as evidence for the wrath of god directed against homosexual conduct.⁶⁶³ If I am not entirely convinced, it is for one reason. These efforts try to explain why the dissemination of ‘clearly private’ personal information such as ‘Wilde is homosexual’ is highly offensive to a reasonable person whereas information such as ‘Wilde is heterosexual’ would be regarded as anodyne.

What might be the implication for the ‘highly offensive to a reasonable person’ test? To my mind, there is no such thing as an *equal* interest of *all* in the security of information relating to one’s sexual orientation. For the sake of brevity, a homosexual may have a heightened interest in the security of information relating to his or her sexuality because such a person might otherwise be viewed with ‘mistrust or opprobrium.’ A heterosexual has a lower security interest with regard to this kind of information, because it constitutes the societal norm. On the other hand, one’s gaze should not be

⁶⁶⁰ Acronym for: Acquired Immune Deficiency Syndrome. *Ozer v Borquez*, 923 P 2d 166, 173 (1997) for further references; see also K Hilzendeger, ‘Unreasonable Publicity: How Well Does Tort Law Protect the Unwarranted Disclosure of a Person’s HIV-Positive State?’ (2003) 35 *Arizona State University Law Journal* 187, 189.

⁶⁶¹ *Urbaniak v Newton*, 226 Cal App 3d 1128, 1140 (1991) (emphasis added); see also B Moretti, ‘Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation’ (1993) 11 *Cardozo Arts and Entertainment Law Journal* 857, 872, who considers such a disclosure as offensive to a reasonable person, because it ‘exposes the individual to hatred, prejudice, and discrimination.’

⁶⁶² *Cumrine v Harte-Hanks Television*, 37 SW 3d 124, 127 (2001).

⁶⁶³ See, eg, B Moretti, ‘Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation’ (1993) 11 *Cardozo Arts and Entertainment Law Journal* 857, 897; K Hilzendeger, ‘Unreasonable Publicity: How Well Does Tort Law Protect the Unwarranted Disclosure of a Person’s HIV-Positive State?’ (2003) 35 *Arizona State University Law Journal* 187, 188.

averted from the fact that a stigma may be attached to homosexuality, but some suggest that this ought not to be the case. Consequently, educative and legal efforts are made to normalise the situation.⁶⁶⁴ The relevant thrust of these efforts is, in my view, to ensure that a homosexual has the same (low) interest in securing information regarding his or her sexual orientation as a heterosexual.⁶⁶⁵

Those who nonetheless insist on the ‘reasonable person’ usually contend that this form of equality is not the *reality* yet. However, as long as the security interests are not equal, the application of the test itself seems dubious because equality of interests as its very premise is not met. It is, then, rather a ‘particularity’ of the plaintiff or at least of a minority group that requires different treatment; these ‘particularities’ are in theory nevertheless not supposed to place limits on someone else’s liberty.⁶⁶⁶

In the same vein, Nicholson J indicated in his able judgment in *P v D*⁶⁶⁷ that publicity given to a mental illness should not be regarded as reason for exclusion, scorn or embarrassment in contemporary society. Within the confines of the adopted American framework of the tort, his Honour nevertheless found the issue to be highly offensive to a reasonable person because a strict application of the test was supposed to be unrealistic.⁶⁶⁸ In other words, the Judge recognised a security interest of the plaintiff in personal information that was *particular* to him or her.

The basic problem, to my eyes, is in both aforementioned constellations a conflict with the liberal imperative of equal concern and respect.⁶⁶⁹ In a nutshell, if privacy is an interest worth protecting in its own name, for example, one’s sexuality is commonly regarded as such a private matter; given that the law distinguishes further be-

⁶⁶⁴ See particularly s 19 NZBoRA; s 21(1)(m) Human Rights Act 1993. Keith J also mentioned the Homosexual Reform Act 1986 – *Hosking* [2005] 1 NZLR 1 (CA) para 182.

⁶⁶⁵ See also D R Knight, “‘I’m Not Gay - Not That There’s Anything Wrong with That!’: Are Unwanted Imputations of Gayness Defamatory?” (2006) 37 *Victoria University of Wellington Law Review* 249, 278.

⁶⁶⁶ See A Ripstein, *Equality, Responsibility, and the Law* (1999) 56.

⁶⁶⁷ [2000] 2 NZLR 591 para 37.

⁶⁶⁸ *Ibid.*

⁶⁶⁹ See R M Dworkin, *Law’s Empire* (1986) 296; see also his *Taking Rights Seriously* (Duckworth, 1978) 182; M Moran, ‘*Rethinking the Reasonable Person - An Egalitarian Reconstruction of the Objective Standard*’ (2003) 168-71 [hereinafter M Moran, ‘*Rethinking the Reasonable Person* (2003)'] for further details.

tween several sexual orientations, an equality issue may arise. The reason why this may cause problems in jurisdictions outside the USA may be found in significantly diverging concepts of equality.⁶⁷⁰

An instructive Canadian suggestion, by way of illustration, seeks to avoid

the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.⁶⁷¹

In the USA, by contrast, such an approach lacks a ‘doctrinal peg.’⁶⁷² In other jurisdictions adopting a public disclosure tort, the question may thus not be as to how homosexuality could be distinguished from heterosexuality while emulating a ‘highly offensive’ test. Instead, the problem could be summarised as follows: given that one could indeed elaborate a compelling difference, are judgments continually holding matters such as ‘Wilde is homosexual’ or ‘P has a mental illness’ as being highly offensive to a hypothetical model person of society such a neat idea in the first place?⁶⁷³ Since this *ought* actually not to be the case, the law would endorse and perpetuate prejudices (ie the ‘reality’) as a basis for affording a legal remedy.⁶⁷⁴ Furthermore, the practical difficulties of such a distinction based on ‘community mores’ would perhaps become

⁶⁷⁰ See, eg, C L'Heureux-Dubé, ‘Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective’ (2003) 1 *International Journal of Constitutional Law* 35, 52 for a brief comparative discussion of Canadian and US authorities.

⁶⁷¹ *Law v Canada* [1999] 1 SCR 497 para 51 per Iacobucci J. For a similar suggestion see also *Brooker v Police* [2007] 3 NZLR 91 (SC) paras 171, 180 per Thomas J; M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 paras 72, 77. For the historical development of the interrelationship of ‘human dignity’ and ‘equality’ see E Grant, ‘Dignity and Equality’ (2007) 7 *Human Rights Law Review* 299, 304-5. See also G Moon and A Allen ‘Dignity Discourse in Discrimination Law: A Better Route to Equality’ (2006) 6 *European Human Rights Law Review* 610, 611, 623.

⁶⁷² J Rosen, ‘Continental Divide’ [2004] *Legal Affairs* 49, 52 discussing *Lawrence v Texas*, 539 US 558 (2003). Justice Kennedy, however, invoked a similar rationale in that case, but on the contested use of comparative law. Similar to the interpretation of freedom of speech, different judges seem to have different predilections as opposed to a single and systematic approach as in Canada or Europe.

⁶⁷³ See also D R Knight, ‘“I’m Not Gay - Not That There’s Anything Wrong with That!”: Are Unwanted Imputations of Gayness Defamatory?’ (2006) 37 *Victoria University of Wellington Law Review* 249, 272.

⁶⁷⁴ See also the Australian provocation case *Green v Re* (1996-97) 191 CLR 334, 407 per Kirby J. With regard to the parallel problem in defamation law see D R Knight, ‘“I’m Not Gay - Not That There’s Anything Wrong with That!”: Are Unwanted Imputations of Gayness Defamatory?’ (2006) 37 *Victoria University of Wellington Law Review* 249, 268-70.

more obvious if one would assume that ‘Wilde is bisexual.’ Wilde takes all sorts I suppose, but it is already difficult to comprehend and argue whether such a disclosure would be as highly offensive as ‘Wilde is homosexual’ or as anodyne as ‘Wilde is heterosexual.’

Somewhat surprisingly, the provocation defence in criminal law may provide useful hints for present purposes. Consider, for instance, that Australian courts have questioned whether an ‘ordinary person’ should lose an objectively required level of self-control when homosexual men encounter heterosexuals proposing intercourse without more. Kirby J rejected the notion of reducing murder to manslaughter on this basis, because it ‘would sit ill with contemporary legal, educative, and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear.’⁶⁷⁵ Dissemination of personal information, of course will not be likened to committing murder. However, similar arguments may be mounted in the privacy context given that a homosexual or mentally ill plaintiff obtains an injunction or retrieves damages on a comparable basis.⁶⁷⁶ Since one’s sexuality and health are routinely regarded as lying at the settled core of personal information protected by the tort, equality issues should not be taken too lightly. Whilst an individual plaintiff receives an advantage (by means of retrieving damages or obtaining an injunction), it is suggested that the systematic unequal treatment of these types of information might have negative implications for the rule of law.⁶⁷⁷

2.5.1.2 *Questionable inherent logic of the test*

As we will see later, the inherently subjective nature of the privacy interest leads to the assumption that ‘highly offensive to a reasonable person’ test fuses subjective and objective elements. The resulting second problem is concerned with what Thomas J

⁶⁷⁵ Ibid, at p 408; see also K Hilzendeger, ‘Unreasonable Publicity: How Well Does Tort Law Protect the Unwarranted Disclosure of a Person’s HIV-Positive State?’ (2003) 35 *Arizona State University Law Journal* 187, 191.

⁶⁷⁶ See also the convincing arguments raised by D R Knight, “‘I’m Not Gay - Not That There’s Anything Wrong with That!’: Are Unwanted Imputations of Gayness Defamatory?” (2006) 37 *Victoria University of Wellington Law Review* 249, 278-79.

⁶⁷⁷ M Moran describes the corrosive effect of bias and prejudice on justice. She points out that ‘systematic mistakes’ (as opposed to *ad hoc* mistakes) are likely to undermine the rule of law - *Rethinking the Reasonable Person* (2003) 179-80.

has identified in the context of the provocation defence as a lack of inherent logic.⁶⁷⁸ Burrows⁶⁷⁹ has made the observation that judges may often give scarce reasons for their decision and this seems to hold true for the situation in the USA.⁶⁸⁰ In an illustrative example, the ‘plaintiffs had been held hostage in their own home by escaped criminals three years prior to publication of [an] article in Life magazine.’⁶⁸¹ The US Supreme Court implied that ‘most people would not consider their former momentary status as a hostage of escaped criminals to be so offensive or discreditable as to render the disclosure of this fact outrageous.’⁶⁸²

Inherent in this example is the ambiguity as to whether the disclosed facts or the disclosure in all the circumstances has to be deemed offensive.⁶⁸³ Assuming *arguendo* that the circumstances of the disclosure are themselves determinative, the second problem crystallises. The reasoning of the court suddenly appears vapid to this writer. Lest it be thought that this problem is peculiar to American jurisdictions, it should be stressed that similar problems occur in other countries where reasonable persons or right-thinking members of the community are invoked as objective standards.⁶⁸⁴ The same problem resurfaces regularly (and is most pressing) when mental processes are at issue. The problem is, then, always as to whether the reasonable person standard is ‘objective’ or whether ‘infirmities of human nature’ should be taken into account.⁶⁸⁵

⁶⁷⁸ *R v Rongonui* [2000] 1 NZLR 385 (CA) para 177.

⁶⁷⁹ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 391, 395.

⁶⁸⁰ See, eg, the reasoning in *Alvarado v KOB-TV LLC*, (2007) Westlaw 2019752 at p 6.

⁶⁸¹ *Time Inc v Hill*, 385 US 374 (1967) as summarised in *Briscoe v Reader's Digest Association Inc*, 93 Cal Rptr 866, 873 (1971).

⁶⁸² *Ibid*, fn 13. It should be noted that the author cannot ascertain this implication from the judgment in *Hill*.

⁶⁸³ See *Vassiliades v Garfinkel's Brooks Bros Inc*, 492 A 2d 580, 588; see also *Shulman v Group W Production Inc*, 18 Cal 4th 200, 248 (1998) per Chin J (concurring and dissenting) (‘[Shulman's] expectations notwithstanding, I do not believe that a reasonable trier of fact could find that *defendants' conduct* in this case was “highly offensive to a reasonable person” [...]’) - emphasis provided.

⁶⁸⁴ See, eg, *Brooker v Police* [2007] 3 NZLR 91 (SC) para 112 per McGrath J. For the parallel problem occurring in the context of the defamation tort see D R Knight, “‘I'm Not Gay - Not That There's Anything Wrong with That!’: Are Unwanted Imputations of Gayness Defamatory?” (2006) 37 *Victoria University of Wellington Law Review* 249, 253.

⁶⁸⁵ Due to the focus on external standards this is of no concern in US law, but for an example provided by an English court refer to the ‘remoteness of damage’ considerations in *Wilkinson v Downton* [1897] 2 QB 57 per Wright J (‘Whether, as the majority of the House of Lords thought in *Lynch v Knight* [(1861) 9 HLC 577, 592, 596], the criterion is in asking what would be the natural effect on *reasonable persons*, or whether, as Lord Wensleydale thought [at p 600], the possible *infirmities of human nature* ought to be recognised’ - emphasis provided) and *Green v Re* (1996-97) 191 CLR 334, 409 per Kirby J for a provocation case.

As for the aforementioned example, most people fortunately have never been held hostage in their own home by escaped criminals. It is, thus, not self-evident what might embolden a judge to believe that an objective reasonable person standing in the shoes of the claimant would or would not be highly offended in the circumstances of the case. Strange though it may seem, the test to be applied is then one of a ‘reasonable person taken hostage in her own home by escaped criminals.’ However, there does not seem to be an objectively ascertainable ‘experience’ on which such a judgment could be based. To this writer, privacy is an individual concern, which has to be reconciled with societal life.⁶⁸⁶ Thus understood, the concept is not subject to empirical evaluation.⁶⁸⁷ Jury decisions aside, the resulting reasoning occurs to me as being just a hunch appraised in important-sounding legal terms.⁶⁸⁸ In brief, a tension between ‘individual’ and ‘objectively reasonable’ experience may exist.

2.5.1.3 Conclusion

It is suggested that the two aforementioned problematic areas point to a theoretical infirmity of the test if applied in the context of a privacy tort. This is undoubtedly an intricate area and a ‘right’ answer is and will be difficult to ascertain. The observation that the ‘highly offensive’ prerequisite embodies ‘something in the nature of a “mores” test’⁶⁸⁹ orchestrated by allusions to hermits should nevertheless only be understood as a useful reminder of the difficulties of striking the balance between ‘security’ and ‘liberty’ in this context. As regards US law, it is clear that the test has indeed no legal profile. During the discussion of the New Zealand law, I will thus attempt to (re-)structure the test particularly by means of drawing an analogy to the already mentioned provocation defence in criminal law. This will pay tribute to the more practical orientation of the law in this country. In theory, as I have sought to show, the test fails to meet its basic premise, because the interests of all citizens in their security and liberty are not

⁶⁸⁶ See also M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 62.1; R Wacks in R Wacks (ed), *Privacy Volume I* (International Library of Essays in Law & Legal Theory) (1993), xi – Introduction.

⁶⁸⁷ S Ingber, ‘Rethinking Intangible Injuries: A Focus on Remedy’ (1985) 73 *California Law Review* 772, 850.

⁶⁸⁸ Most members of juries were presumably also never held hostage, but the verdict would at least represent an inter-subjective share of ‘community mores’ as opposed to a subjective result found by a judge.

⁶⁸⁹ W L Prosser, *Handbook of the Law of Torts* (4th Ed, 1971) 812.

equal. Notwithstanding, the sole purpose of restructuring the test later on is to make it altogether superfluous. An approach protecting, *inter alia*, information regarding one's sexuality for its own sake is in my view preferable. Coincidentally, English law to which we will turn now has achieved this.⁶⁹⁰ The following discussion will also provide a first impression as to why the test should be rejected in the context of a constitutionalised tort.

2.5.2 The 'highly offensive' test in English law

In English law, having an initial 'reasonable expectation of privacy' is developing as the touchstone of private life.⁶⁹¹ Independently of this test, some statements of the courts suggest an embryonic second test, broadly akin to a fault standard. Baroness Hale pointed out in *Campbell* that a court should ascertain - prior to the proportionality balancing exercise - whether 'the person publishing the information knows or ought to know that there is a *reasonable expectation* that the information in question will be kept confidential.'⁶⁹² This element stems most likely from the guidelines laid out by Lord Woolf CJ in *A v B Plc*.⁶⁹³ Nevertheless, it is not unreasonable to contend that the element adds nothing to the examination as to whether the *claimant's* expectation of privacy was reasonable in the first place, if the *defendant* knew or ought to have known that the claimant had such an expectation. This may be contrasted to traditional breach of confidence where the knowledge (or purported knowledge) of the recipient that the information was imparted in confidence gives rise to an 'obligation of confidence.'⁶⁹⁴ The defendant's knowledge is therefore a reason to impose a duty. As is well known, however, there is no necessity for an obligation of confidence in the privacy context. In other words, the *defendant's* knowledge is not conclusive for the *claimant's* 'reasonable

⁶⁹⁰ It goes without saying that the same is essentially true for Tipping J's approach in *Hosking*.

⁶⁹¹ *Campbell* [2004] 2 All ER 995 (HL) para 21 per Lord Nicholls; para 137 per Baroness Hale; *McKennitt* [2006] EMLR 178 (QB) para 50 per Eady J; [2007] 3 WLR 194 (CA) para 11 per Buxton LJ; *His Royal Highness the Prince of Wales v Associated Newspapers Ltd* [2008] EMLR 66 (Ch) para 88 per Blackburne J; [2007] 3 WLR 222 (CA) para 88 per Blackburne J; *Browne* [2007] 3 WLR 289 (CA) para 24 per Sir Anthony Clarke MR and *Murray* [2007] EMLR 583 (Ch) para 26 per Patten J.

⁶⁹² *Campbell* [2004] 2 All ER 995 (HL) para 134; see too *Douglas v Hello! Ltd (No3)* [2006] QB 125 para 81 per Lord Phillips MR and *HRH the Prince of Wales v Associated Newspapers Ltd* [2007] 3 WLR 222 (CA) para 91 per Blackburne J. But compare N A Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628, 643 who seems to interpret this statement as an objective check on the claimants subjective expectations of privacy. Moreham's view seems to be reflected in *Browne* [2007] 3 WLR 289 (CA) para 31 per Sir Anthony Clarke MR.

⁶⁹³ [2002] 2 All ER 545 para 11 guideline (ix).

⁶⁹⁴ *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415, 420-1 per Megarry J.

expectation' itself. The function of this element, it seems reasonable to suggest, therefore differs from traditional confidence doctrine. However, a fault standard, of course, would not be incompatible with a rights-based approach. Instead of being a reason for imposing a duty, a fault standard restricts what would otherwise be strict liability.⁶⁹⁵ This element of the remedy would be optional. It might be argued that it depends on the particular account of personal responsibility whether such an element should be adopted. In abstract terms, it is said that corrective justice demands 'compensation only when the injurer's wrongful *actions* cause the victim's wrongful losses.'⁶⁹⁶ An optional fault standard, in contrast, would imply a 'thicker' notion of personal responsibility; that is to say that 'fault in the *action*' needs to be accompanied by 'fault in the *actor*.'⁶⁹⁷

Be that as it may, the 'highly offensive' test has not been well received.⁶⁹⁸ These two tests had been considered in the House of Lords decision in *Campbell* along with an 'obviously private facts'⁶⁹⁹ test in order to delimit the claimant's privacy interest.⁷⁰⁰ The joint judgment in *Hosking*,⁷⁰¹ by contrast, linked the 'highly offensive' test to the publicity element and made it clear that the test was not part of the test as to whether information is private. The concomitant assertion saying that English courts likewise employ an additional highly offensive test later turned out to be insubstan-

⁶⁹⁵ N Jansen, 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' (2004) 24 *Oxford Journal of Legal Studies* 443, 467.

⁶⁹⁶ G J Postema, 'Risks, Wrongs and Responsibility – Coleman's Liberal Theory of Commutative Justice' (1993) 103 *Yale Law Journal* 861, 879 (emphasis added).

⁶⁹⁷ *Ibid.*, at p 879-80.

⁶⁹⁸ See *Browne* [2007] 3 WLR 289 (CA) para 24 per Sir Anthony Clarke MR; [2007] EWHC 202 (QB) para 42 per Eady J. It should be noted, however, that the test was taken into consideration in *Murray* [2007] EMLR 583 (Ch) para 26 per Patten J.

⁶⁹⁹ There is no need for an initial test if the information is 'obviously private' - *Campbell* [2004] 2 All ER 995 (HL) para 96 per Lord Hope; *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) para 35 per Blackburne J.

⁷⁰⁰ N A Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628, 630; T Aplin, 'The Development of the Action for Breach of Confidence in a Post-HRA Era' [2007] *Intellectual Property Quarterly* 19, 25.

⁷⁰¹ [2005] 1 NZLR 1 (CA) para 127; see also *Andrews v TVNZ Ltd* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 25; *TVNZ Ltd v Rogers* [2007] 1 NZLR 1 (CA) para 68 per Panckhurst and O'Regan JJ.

tial.⁷⁰² The threshold test for personal or private information in New Zealand, like the USA and unlike the UK, is hence the highly offensive test.⁷⁰³

Despite all its advantages, perhaps no case other than *Browne v Associated Newspapers Ltd*⁷⁰⁴ pinpoints the difficulties of the English approach more vividly. The claimant had intended to keep both his ‘homosexuality’⁷⁰⁵ as well as business information which he had entrusted to his partner during a ‘homosexual relationship’ out of the press. To compound matters, it was to some degree also not clear whether the disputed information was true or false.⁷⁰⁶ The major problem is the unclear distinction between traditional and extended breach of confidence.⁷⁰⁷ It is difficult to improve on Tipping J’s formulation who considered ‘it legally preferable and better for society’s understanding of what the Courts are doing to achieve the appropriate substantive outcome under a self-contained and stand-alone common law cause of action.’⁷⁰⁸

However, it seems settled that the nature of the claimant’s sexual orientation plays no decisive role under both heads.⁷⁰⁹ We are nonetheless only concerned with the claimant’s homosexuality. In this respect, the courts determine first whether the claimant’s privacy interests had been engaged. The claimant’s subjective expectation of privacy in *Browne* had to be tested against a normative reasonableness standard.⁷¹⁰ In

⁷⁰² Eg, *Rogers v TVNZ Ltd* [2007] NZSC 91 para 25 per Elias CJ. But compare *Hosking* [2005] 1 NZLR 1 (CA) para 42 Per Gault P and Blanchard J; *Andrews v TVNZ Ltd* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 37.

⁷⁰³ See also *Brown v Attorney-General* [2006] DCR 630 para 78 per Spear J.

⁷⁰⁴ [2007] EWHC 202 (QB) per Eady J; [2007] 3 WLR 289 (CA) para 24 per Sir Anthony Clarke MR.

⁷⁰⁵ *Browne* [2007] EMLR 19 (QB) para 55 per Eady J. One’s sexual orientation is encompassed by the scope of art 8 ECHR - *Peck v UK* (2003) 13 BHRC 669 para 57.

⁷⁰⁶ Defamation was not pleaded and this issue was, according to Eady J, not critical to the determination on the facts of the case - *ibid*, para 30.

⁷⁰⁷ For discussions of the differences see, eg, *Murray* [2007] EMLR 583 (Ch) para 20 per Patten J; T Appin, ‘The Development of the Action for Breach of Confidence in a Post-HRA Era’ [2007] *Intellectual Property Quarterly* 19, 21. There is, however, an occasional overlap between the two remedies – see, eg, *Rogers v TVNZ Ltd* [2007] NZSC 91 para 24 per Elias CJ. It had been emphasised recently, however, that both forms have to be kept separate - *Douglas v Hello! Ltd (No 3)* [2007] 2 WLR 920 (HL) para 118 per Lord Hoffmann; para 255 per Lord Nicholls.

⁷⁰⁸ *Hosking* [2005] 1 NZLR 1 (CA) para 246; see also para 45 per Gault P and Blanchard J.

⁷⁰⁹ Eady J reiterated that both heterosexual and homosexual relationships had been protected in traditional breach of confidence actions - *Browne* [2007] EMLR 19 (QB) para 11; see also [2007] 3 WLR 289 (CA) para 85 per Sir Anthony Clarke MR.

⁷¹⁰ *Ibid*, para 55 (‘I understand that the claimant prefers to keep his relationships, and sexual orientation, out of the media and that he has made strenuous efforts in the past to avoid it being mentioned, but that is a different matter from having a reasonable expectation of privacy’).

other words, at issue was whether the claimant ought to have a reasonable expectation under the circumstances.⁷¹¹ In this respect, arguments have to be made and considered: on one hand, the claimant has made strenuous efforts to keep his homosexuality out of the press; on the other hand, the claimant attended ‘various social events [...] including events connected with the claimant’s business activities’ together with his partner.⁷¹² Based on the merits of the case, the question arose as to whether his expectation of privacy was still reasonable. An important aspect of those meetings may have been that they took place in the claimant’s house and that only friends and acquaintances were involved. Privacy, in the context of English law, also has a social dimension in order to foster relationships.⁷¹³ These relationships are nevertheless not necessarily to be equated with the relationship of confidence of the traditional equitable remedy.⁷¹⁴

Against this backdrop, Eady J held that the expectation was no longer reasonable. The privacy right of the claimant had consequently not been engaged.⁷¹⁵ The Court of Appeal, on the other hand, cautioned by mentioning that there may be ‘potentially an important distinction between information which is made available to a person’s circle of friends or work colleagues and information which is widely published in a newspaper.’⁷¹⁶ However, whether the homosexual claimant would have faced, for example, ‘mistrust or opprobrium’ once the information is published is irrelevant to each conclusion.⁷¹⁷ This is not to suggest that discrimination does not exist in reality. The point to be made is simply that the law should not embrace these views; there should be no *ratio decidendi* on this point if possible. In short, personal information regarding one’s sexuality is treated as being of equal concern and respect in English law regardless of any particular sexual orientation.

⁷¹¹ See also M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 160.

⁷¹² *Browne* [2007] EMLR 19 (QB) paras 4, 55 per Eady J.

⁷¹³ *Ibid*, para 33; *Peck v UK* (2003) 13 BHRC 669 para 57 (The ECtHR added that this social dimension ‘may include activities of a professional or business nature,’ which was apparently overlooked by the English courts). See also M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 paras 81, 145 for further details.

⁷¹⁴ *Browne* [2007] 3 WLR 289 (CA) para 26 per Sir Anthony Clarke MR (‘[...] in answering the question whether in respect of the disclosed facts the claimant has a reasonable expectation of privacy in the particular circumstances of the case the nature of *any* relationship between the *relevant persons or parties* is of considerable potential importance’ – emphasis provided)

⁷¹⁵ *Browne* [2007] EMLR 19 (QB) para 55 per Eady J.

⁷¹⁶ *Browne* [2007] 3 WLR 289 (CA) para 61 per Sir Anthony Clarke MR.

⁷¹⁷ Compare, eg, *Urbaniak v Newton*, 226 Cal App 3d 1128, 1140 (1991).

Why is the highly offensive test superfluous in English law? An important factor is surely that privacy is protected in its own name. Moreover, a highly offensive test was never part of the traditional breach of confidence action. These factors notwithstanding, the civil ‘wrong’ in England is effectively to be found in an infringement of a right to privacy.⁷¹⁸ This should be distinguished from the ‘harm’ of being ‘truly humiliated’ that we find in the torts as outlined by the joint judgment in New Zealand and in the USA.⁷¹⁹ Even more important in this respect is the horizontal application of arts 8 and 10 ECHR and their reconciliation by means of a proportionality test. Barak has pointed out that the proportionality test ‘lies at the foundation of the *reasonableness* standard, which is merely a proper *balancing* between conflicting principles.’⁷²⁰ Moreover, by connecting the cause of action closer to human rights instruments, fundamental requirements of distributive justice are provided.⁷²¹

We have already noted that the ‘highly offensive to a reasonable person’ test also requires a balancing of interests and incorporates an element of distributive justice. According to Ripstein, the reasonable person is to be understood ‘as the expression of an idea of fair terms of social cooperation;’ as such, the test signifies John Rawls’ distinction between the *rational* (acting to promote one’s ends effectively) and the *reasonable* (cooperating with others as free and equal on terms all can accept).⁷²² According to Rawls, the distinction between the reasonable and the rational goes back to Immanuel Kant.⁷²³ Without going into too much detail at this point,⁷²⁴ Rawls uses the reasonable ‘as an element of the idea of society as a system of fair cooperation and that its fair

⁷¹⁸ See, eg, *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) para 122 per Blackburne J.

⁷¹⁹ *Hosking* [2005] 1 NZLR 1 (CA) para 126 per Gault P and Blanchard J. The importance of this distinction was emphasised by M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 23.

⁷²⁰ A Barak, ‘Proportional Effect: The Israeli Experience’ (2007) 57 *University of Toronto Law Journal* 369, 381-2 (emphasis supplied).

⁷²¹ See R Mullender, ‘The Reasonable Person, the Pursuit of Justice, and the Negligence Law’ (2005) 68(4) *Modern Law Review* 681, 686.

⁷²² A Ripstein, *Equality, Responsibility, and the Law* (1999) 7; see generally J Rawls, *Political Liberalism* (1993) 48-54; G C Keating, ‘Reasonableness and Rationality in Negligence Theory’ (1996) 48 *Stanford Law Review* 311, 311-2.

⁷²³ J Rawls, *Political Liberalism* (1993) 48 fn 1.

⁷²⁴ Later on during the discussion of the New Zealand law, I will try to provide a slightly fuller account of the difference between the rational and the reasonable during the discussion of the ‘image of the person’ in the context of human rights instruments. See below Chapter Four, 2.2.

terms be reasonable for all to accept is part of its idea of reciprocity.⁷²⁵ This helps to say that rational agents have to engage in fair social cooperation. Effectively, I suggest, the distinction between the rational and the reasonable aims at solving the tension between ‘individual’ and ‘society.’ This fundamental issue, as I have sought to show, needs to be addressed in the privacy context as well. Likewise, mediating between what is ‘rational’ and what is ‘reasonable’ lies at the heart of the proportionality test, as we will see later in further detail. Suffice it to say at this point that human rights instruments nevertheless presuppose a rational human being. Individuals are not, as Prosser would have it, ‘congenital fools.’⁷²⁶ The individual liberty of those rational agents is to be restricted no more than necessary or reasonable on terms all can accept in a democratic society. This is because distributive justice is agent-general as opposed to corrective justice, which is agent-specific.⁷²⁷ In brief, the reasonable person and proportionality tests serve essentially the same legal purpose.

It is suggested, in conclusion, that employing both tests in a single cause of action (as the joint judgment proposed in *Hosking*⁷²⁸) is imperfect. The Court was rather confronted with an either/or situation. Given that the reasonable person test is preferred in New Zealand, why rock the boat with an additional proportionality test? To my eyes, ‘a recipe for confusion’⁷²⁹ could once more be found in the fact that English and US American influences are mixed with one another without adequate reflection.

As for English law, Lord Nicholls’ words are therefore very true: ‘in deciding what was the ambit of an individual’s *‘private life’* in particular [...] courts need to be on guard against using as a touchstone a test which brings into account considerations which should *more properly be considered* at the later stage of *proportionality*;⁷³⁰ ‘the “highly offensive” formulation can all too easily bring into account, when deciding

⁷²⁵ J Rawls, *Political Liberalism* (1993) 49-50.

⁷²⁶ W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 152.

⁷²⁷ W N R Lucy, *Philosophy of Private Law* (2007) 318.

⁷²⁸ *Hosking* [2005] 1 NZLR 1 (CA) paras 125, 126 (employing a reasonable person test) and para 132 (referring to proportionality); see also *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 86 per Panckhurst and O’Regan JJ.

⁷²⁹ *Campbell* [2004] 2 All ER 995 (HL) para 22 per Lord Nicholls.

⁷³⁰ *Campbell* [2004] 2 All ER 995 (HL) para 21; see also *McKennitt* [2007] 3 WLR 194 (CA) para 11 per Buxton LJ.

whether the disclosed information was *private*, considerations which go more properly to issues of *proportionality*, for instance, the degree of intrusion into private life.’⁷³¹ The same holds true, for example, for the matter as to whether the claimant is a ‘public figure.’⁷³² Subjects to the law should be treated with equal concern and respect.⁷³³ This rather Kantian notion is also in line with an approach initially based on corrective justice. As Aristotle pointed out:⁷³⁴

it makes no difference, for instance, whether a robbery is committed by a good man on a bad or by a bad man on a good [...]: the law looks only to the difference created by the injury and treats the men as previously equal, where the one does an the other suffers injury, or the one has done and the other suffered harm.

In brief, whether the claimant has a ‘reasonable expectation of privacy’ should be determined by an approach implementing corrective justice concerns. The particular features of the two parties involved and the respective merit of their claims are of no importance in this context.⁷³⁵ Whatever the case may be, it is ‘wrong’ to disseminate personal or private information if there has been a ‘reasonable expectation of privacy.’⁷³⁶

The fact that the public’s interest in learning about personal information of ‘public figures’ undoubtedly may be higher is another matter.⁷³⁷ Hence, it is suggested that these issues should preferably be dealt with separately, viz, in the context of justifying a limit on freedom of speech. At this stage, the merit of the public figure’s claim is evaluated, for instance, in comparison to the claim of a private person. By means of employing a proportionality test, the second stage therefore seeks to clarify if the ‘wrong’

⁷³¹ Ibid, para 22.

⁷³² Eg, *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) paras 44, 45, 106, 110 per Blackburne J; *McKennitt* [2007] 3 WLR 194 (CA) para 56 per Buxton LJ. Compare *Hosking* [2005] 1 NZLR 1 (CA) para 121 per Gault P and Blanchard J; R Tobin, ‘Privacy: One step forward, two steps back’ [2003] *New Zealand Law Journal* 256, 257.

⁷³³ See also Lord Steyn, ‘Democracy through Law’ [2002] *European Human Rights Law Review* 723, 731-2.

⁷³⁴ Aristotle, *Nicomachean Ethics*, Book Five, at p 81.

⁷³⁵ See above Chapter Two, 2.3.3.2.

⁷³⁶ See also R Mullender, ‘Tort, Human Rights, and Common Law Culture’ (2003) 23 *Oxford Journal of Legal Studies* 301, 308-9.

⁷³⁷ See *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2006] EWCA Civ 1776 para 70 per Lord Phillips CJ.

amounts to a ‘wrongful loss’ of privacy. It constitutes a ‘wrong’ insofar as the right to privacy is invaded, but it is a justified wrong to the extent the countervailing right to freedom of speech bears greater weight on the facts of the case.⁷³⁸ An unjustified infringement of the right of privacy, on the other hand, amounts to an actionable violation of the right. As a result, it may be wrong to disseminate information about a public person’s private life, but this does not necessarily mean that the dissemination amounts to a wrongful loss of privacy. At least if one favours a liberal approach, I suggest, English law thereby achieves much more with less if compared to New Zealand and US law.⁷³⁹ That it is nonetheless treated as being essentially the same is insubstantial to my eyes.

In order to portray another major difference between English and US law, one should refrain from regarding ‘formalism’ as a pejorative term.⁷⁴⁰ Black-and-white views, as already suggested, should be avoided; the question is rather what the appropriate form of law is in a particular context. Formalism generally ensures a certain degree of predictability, which is a rightfully cherished value in law.⁷⁴¹ Predictability itself is perhaps not the sovereign virtue in law however. English law, as I understand it, employs a formal framework, in a layperson’s view not dissimilar to Lord Wilberforce’s two-step approach to negligence law as outlined in *Anns*.⁷⁴² But where a *prima facie* duty may seem odd, a *prima facie* right may not. As an analytical framework, it allows recognition of the full context of the case on a principled basis and in an inherently coherent manner.⁷⁴³ Moreover, it is a forward-looking approach requiring induc-

⁷³⁸ See also G J Postema, ‘Risks, Wrongs and Responsibility – Coleman’s Liberal Theory of Commutative Justice’ (1993) 103 *Yale Law Journal* 861, 876-7.

⁷³⁹ It should be noted that the additional ‘highly offensive’ test has been called into question recently - *Rogers v TVNZ Ltd* [2007] NZSC 91 (SC) para 25 per Elias CJ.

⁷⁴⁰ See generally R S Summers, ‘How Law is Formal and Why it Matters’ (1997) 82 *Cornell Law Review* 1165.

⁷⁴¹ See also the discussion in S Todd, ‘Negligence and Policy’ in P Rishworth (ed), *The struggle for simplicity in the law* (1997) 105, 110.

⁷⁴² *Anns v London Borough Council* [1978] AC 728, 741; *McLaughlin v O’Brian* [1982] 1 AC 410, 420-1. See also *Hosking* [2005] 1 NZLR 1 (CA) para 259 per Tipping J.

⁷⁴³ English judges are very alert to avoid turning what is in fact a ‘principle’ into a mechanically applied ‘rule’ or similar form of generalisation - *Browne* [2007] EMLR 19 (QB) para 41 per Eady J citing *W (Children) (Identification: Restrictions on Publication)*, *Re* [2005] EWHC 1564 (Fam) para 53 per Sir Mark Potter P; *CC v AB* [2007] EMLR 11 (QBD) para 13 per Eady J. See also *Dorset Yacht Co Ltd v Home Office* [1970] 2 All ER 294, 297 per Lord Reid (‘[...] there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it’ – emphasis provided).

tive normative reasoning.⁷⁴⁴ This approach will never (and cannot possibly) achieve the degree of predictability of US law. US law seems to achieve these high levels of predictability and certainty by collapsing ‘form’ into ‘substance’ of the law.⁷⁴⁵ It has the virtues and vices of a ‘checklist;’ this writer cannot confirm an actual development of the disclosure tort over the last four decades. The joint judgment in *Hosking*, in contrast, seems to fuse both approaches in order to develop the privacy tort incrementally (ie, backward-looking to authority, including authority provided by both of the aforementioned jurisdictions).⁷⁴⁶ It is suggested that this might also be an ingredient of a recipe for confusion. English and American law are, as we have seen, quite different and it is not easy to see how they can be combined meaningfully.

2.6 *The newsworthiness element*

We will now turn to the newsworthiness element of the US tort and therefore to the speech side of the equation. As already elaborated, the US Supreme Court refused to answer the crucial question as to whether restrictions on publishing true information are compatible with the First Amendment.⁷⁴⁷ It is, thus, up to the Supreme Courts of each state to decide whether the public disclosure branch of the tort is compatible with the First Amendment and should form part of the common law. The following exposition will predominantly show the determination of ‘newsworthy’ private information and the impact of First Amendment jurisprudence on this process.

2.6.1 *The rejection of the tort in North Carolina*

The case of *Hall v Post*⁷⁴⁸ provides an illustrative example of the existing uncertainty left behind by the Federal Supreme Court.⁷⁴⁹ Although a ‘right’ of privacy had

⁷⁴⁴ Tipping J seems to have embraced this forward-looking way of approaching the law - *Hosking* [2005] 1 NZLR 1 (CA) para 256.

⁷⁴⁵ See generally R S Summers, ‘How Law is Formal and Why it Matters’ (1997) 82 *Cornell Law Review* 1165, 1209.

⁷⁴⁶ Consider *Hosking* [2005] 1 NZLR 1 (CA) para 117 per Gault P and Blanchard J. See also *Hosking* [2003] 3 NZLR 385 (HC) paras 119, 140 per Randerson J. See S Todd, ‘Negligence and Policy’ in P Rishworth (ed), *The struggle for simplicity in the law* (1997) 105, 110 and E W Thomas, ‘A Return to Principle in Judicial Reasoning and an Acclamation of judicial Autonomy’ (1993) 23 *Victoria University of Wellington Law Review* Monograph 5, pp 59-62 for further details.

⁷⁴⁷ *Cox Broadcasting Corp v Cohn*, 420 US 469, 491 (1975); *Bartnicki v Vopper*, 532 US 514, 529 (2001).

⁷⁴⁸ 372 SE 2d 711 (1988).

been acknowledged as a part of North Carolina's tort law, the Supreme Court refused to recognise the public disclosure branch. The main reason for this judgment was the familiar argument asserting that this branch most directly affected the First Amendment. Justice Mitchell stated for the majority that the privacy interest involved was not constitutionally protected.⁷⁵⁰ With reference to *Cox Broadcasting Corp v Cohn*⁷⁵¹ the majority emphasised the already existing tension between tort law and the First Amendment, to which the recognition of the disclosure branch would further contribute.⁷⁵² However, Justice Frye⁷⁵³ concurred with the outcome but dissented from the categorical rejection of this branch of the tort. The learned Judge argued:⁷⁵⁴

I do not accept the notion that the tension already existing between the First Amendment and the law of torts requires the *non-recognition* of a *legitimate* claim [...] against a media defendant for wrongfully publishing highly offensive private facts which are not of legitimate concern to the public. [...] I do not believe that the media should be given a licence to pry into the private lives of ordinary citizens and spread before the public highly offensive but very private facts, without any degree of accountability. Such is not required by either the federal or state constitutions.

Frye J agreed with the Court of Appeal's conclusion that both interests could be reconciled by applying a 'newsworthiness' or 'public interest' test in order to determine what publications are constitutionally privileged and what publications are actionable.⁷⁵⁵ These tests were supposed to give credence to the viewpoint that neither the so-called right of privacy nor freedom of the press was absolute.⁷⁵⁶ In the Judge's opinion, the chilling effect that this tort may have on freedom of the press would be minimised if the question of whether the material is of legitimate public concern were initially a question of law.⁷⁵⁷

⁷⁴⁹ G L Bostwick, 'The Newsworthiness Element: *Shulman v Group W Prods., Inc.* Muddies the Waters' (1999) 19 *Loyola of Los Angeles Entertainment Law Review* 225, 238.

⁷⁵⁰ *Hall v Post*, (1988) 372 SE 2d 711, 717.

⁷⁵¹ 420 US 469 (1975).

⁷⁵² *Hall v Post*, 372 SE 2d 711, 717 (1988).

⁷⁵³ Meyer J joined his opinion.

⁷⁵⁴ *Ibid.*

⁷⁵⁵ *Ibid.*, at p 719 ('[t]he first amendment encourages a robust debate and the gravamen of the first amendment, as recently stated by the Supreme Court is the "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"').

⁷⁵⁶ *Ibid.*, at p 720.

⁷⁵⁷ *Ibid.*

The case reveals two distinct ways of approaching limitations on freedom of speech, both of which were also displayed in *Hosking*. The majority in *Hall* regarded the abstract privacy value related to the cause of action itself as an unnecessary interference with free speech interests. The minority, by contrast, emphasised the limited importance of abstract considerations; determinative was whether personal information in a concrete case results in a legitimate claim and therefore a justified interference with freedom of speech. As we will see later in further detail, the minority in *Hosking* also regarded privacy predominantly as an abstract interest that posed an unjustified limit on free speech interests. Particularly Keith J argued that the US experience told strongly against a social need for a privacy action.⁷⁵⁸ The majority, on the other hand, stressed that the common law may develop side-by side with the statutory protection of privacy interests;⁷⁵⁹ their Honours, then, tried to outline what they perceived as a *legitimate claim* based on the facts of individual cases.⁷⁶⁰ The ‘keeping the floodgates shut’ argument that seems to underlie particularly the minority opinions in *Hosking* is certainly valid. However, it could be raised against every development of the law and is not a persuasive argument as long as the litigation is *legitimate*.⁷⁶¹

2.6.2 *The newsworthy element in Californian law*

Most states have nonetheless acknowledged the public disclosure branch of the tort. This is in line with its *theoretical* constitutional viability given that appropriate attention to free speech concerns is ensured. Once an element such as ‘newsworthiness’ or ‘public concern’ is established, the focus shifts to the viability of the tort for *practical* purposes.⁷⁶² The necessary presupposition, as we recollect, would be to determine a ‘public concern’ without swallowing the tort altogether.⁷⁶³ In this respect, it is convenient to consider predominantly Californian authorities, which have been particularly influential in New Zealand.

⁷⁵⁸ *Hosking* [2005] 1 NZLR 1 (CA) paras 210-220 per Keith J; Anderson J’s judgment is admittedly ambiguous - at paras 267, 268.

⁷⁵⁹ *Ibid*, para 108 per Gault P and Blanchard J.

⁷⁶⁰ *Ibid*, paras 110, 115.

⁷⁶¹ This point was made by G Ragland, ‘The Right of Privacy’ (1929) 17 *Kentucky Law Journal* 85, 94.

⁷⁶² See, eg, *Shulman v Group W Production Inc*, 18 Cal.4th 200, 215-6 (1998).

⁷⁶³ See above Chapter Two, 2.6.

2.6.2.1 The pre-Shulman era

In *Melvin v Reid*⁷⁶⁴, the Supreme Court of California determined first a ‘foundation for a [privacy] action in tort’ and found such a basis in the Californian constitution.⁷⁶⁵ This might be seen as a variation of *ubi jus ibi remedium*, because the basis was not the classic common law right to personal security but a constitutional provision.⁷⁶⁶ Prosser opined that this constituted a dubious foundation,⁷⁶⁷ but more interesting is perhaps that the recognition of the tort implied what would today be called horizontal application of higher order law. The basis of the privacy tort, section 1 of article 1 of the Californian Constitution,⁷⁶⁸ had heretofore never been interpreted as restricting the activities among private individuals; the sole purpose of the state constitution was rather confined to negative obligations of the state and its institutions.⁷⁶⁹

The reconciliation of privacy and free speech interests received detailed consideration in *Briscoe v Reader's Digest Association Inc*⁷⁷⁰. Broadly speaking, the ‘newsworthiness’ element presents two major problems:

- the determination of the substance of a ‘newsworthy’ matter; and
- whether its application constitutes a ‘matter of law’ determined by judges or ‘a matter of fact,’ which should be left for a jury.

The plaintiff in *Briscoe* had been involved in a hijacking case; the defendant published details of this incident eleven years after his criminal conviction. As to the first problem, the court ruled that the public’s interest in past crimes might be as strong

⁷⁶⁴ 112 Cal App 285 (1931). The case highlighted and gave ‘dramatic impetus’ to the public disclosure tort - G E White, *Tort Law in America: An intellectual History* (expanded ed, 2003) 175.

⁷⁶⁵ Ibid, at p 291.

⁷⁶⁶ See above Chapter Two, 2.3.2.2.

⁷⁶⁷ W L Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383, 392-3.

⁷⁶⁸ Section 1 of article I of the Constitution of California read at that time as follows: ‘All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness.’ This provision was amended in 1972 and includes now a self-executing right to privacy - *Urbaniak v Newton*, 226 Cal App 3d 1128, 1136 (1991). The provision applies both to private and government entities - *Four Navy Seals v Associated Press*, 413 F Supp 2d 1136, 1143 (2005).

⁷⁶⁹ G Dickler, ‘The Right of Privacy – A Proposed Redefinition’ (1936) 70 *United States Law Review* 435, 447.

⁷⁷⁰ 93 Cal Rptr 866 (1971).

as it is in present offences; the defendant therefore had the ‘right’ to publish information about the *incident* itself.⁷⁷¹ Nonetheless, this ‘right’ did not amount to a lawful identification of the offender; rather the goals sought by each interest had to be furthered with minimum intrusion upon the other.⁷⁷² The Supreme Court of California, thus, entered into a weighing process. As an offender who had reverted to a lawful life, the plaintiff no longer needed to satisfy the curiosity of the public.⁷⁷³ Together with the state’s policy interest in the integrity of the rehabilitation process, the individual’s privacy interest outweighed the defendant’s interest in disseminating these facts.⁷⁷⁴ The Court was nevertheless mindful of the fact that the balance always had to be weighed in favour of free speech in order to avoid a chilling effect on First Amendment freedoms through uncertainty.⁷⁷⁵

In order to determine the substance of the newsworthiness element the Court considered: (1) the social value of the facts published, (2) the depth of the intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety.⁷⁷⁶ Additional queries notwithstanding, it should be noted at the outset that the ‘depth of intrusion’ subtest conflates a part of the ‘highly offensive’ (balancing) test into the newsworthiness (balancing) element. We are therefore again confronted with the already familiar problem of keeping separate tests of the tort action apart.⁷⁷⁷

As to the second aforementioned problem, the determination of the newsworthiness element was regarded as largely being a matter of fact, which ‘a jury is uniquely well-suited to decide.’⁷⁷⁸ Particularly the ‘social value’ of the disseminated information

⁷⁷¹ *Briscoe v Reader’s Digest Association Inc*, 93 Cal Rptr 866, 872 (1971).

⁷⁷² *Ibid*, at p 874; see also *Forsher v Bugliosi*, 163 Cal Rptr 628, 638 (1980).

⁷⁷³ *Ibid*.

⁷⁷⁴ *Ibid*, at p 875.

⁷⁷⁵ *Ibid*.

⁷⁷⁶ *Ibid*; *Forsher v Bugliosi*, 163 Cal Rptr 628, 638 (1980); *Diaz v Oakland Tribune Inc*, 139 Cal App 3d 128, 130 (1983) and *Shulman v Group W Production Inc*, 18 Cal 4th 200, 250 (1998) per Brown J (concurring and dissenting). This three-prong-test represents a normative approach – L N Woito and P McNulty, ‘The Privacy Disclosure Tort and the First Amendment: Should the Community decide Newsworthiness?’ (1979) 64 *Iowa Law Review* 185, 197.

⁷⁷⁷ See above Chapter Two, 2.4.

⁷⁷⁸ *Diaz v Oakland Tribune Inc* 139 Cal App 3d 128, 133 (1983).

alludes to the relevance of community mores and standards of decency.⁷⁷⁹ However, this is arguably not the ‘community mores’ test of the Restatement but a unique approach.⁷⁸⁰ In brief, the importance of freedom of speech had been emphasised, but the plaintiff was still provided with a fair chance of prevailing.

This balancing approach became increasingly problematic in the wake of *Cox Broadcasting Corp v Cohn*⁷⁸¹. Mr Briscoe’s name was, of course, a matter of *public record* as were the facts of the crime he committed. Likewise, in *Melvin v Reid*⁷⁸², Ms Melvin’s name was a matter of public record as were the details of her murder trial. The absolute protection of these records did not allow differentiation of any kind. In 2003, the Supreme Court of California finally put the record straight by holding that *Cox* precluded the approach adopted in *Briscoe* and overruled the case.⁷⁸³ The ‘paradoxon’ inherent in the decisions of *Briscoe* and *Melvin* was known for almost 70 years however.⁷⁸⁴ As a result, even the ‘narrow exception’⁷⁸⁵ for criminals and past crimes was finally identified as unconstitutional. The policy interests in the rehabilitation of convicted offenders (which were ‘most important’ to the decision in *Briscoe*)⁷⁸⁶ were therefore of no concern anymore. It should be noted that particularly the lower courts in the USA cannot agree ‘on how to deal with factors other than speech.’⁷⁸⁷ Particularly the

⁷⁷⁹ Ibid; see also P Gielniak, ‘Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment’ (1999) 39 *Santa Clara Law Review* 1217, 1235; D M Worley, ‘*Shulman v Group W Productions*: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity’ (1999-2000) 27 *Western State University Law Review* 535, 567-8.

⁷⁸⁰ J A Jurata, ‘The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts’ (1999) 36 *San Diego Law Review* 489, 506.

⁷⁸¹ 420 US 469 (1975).

⁷⁸² 112 Cal App 285, 290-1 (1931).

⁷⁸³ *Gates v Discovery Communications Inc*, 131 Cal Rptr 2d 534, 545 (2003); 106 Cal App 4th 677 (2003).

⁷⁸⁴ Consider G Dickler, ‘The Right of Privacy – A Proposed Redefinition’ (1936) 70 *United States Law Review* 435, 446-7.

⁷⁸⁵ The general rule states that once someone became a public figure, he or she may be subject to public interest to the end of the person’s days - *Shulman v Group W Productions Inc*, 18 Cal 4th 200, 222 (1998).

⁷⁸⁶ *Forsher v Bugliosi*, 163 Cal Rptr 628, 638 (1980), see also *Gates v Discovery Communications Inc*, 131 Cal Rptr 2d 534, 545 (2003).

⁷⁸⁷ J Elford, ‘Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort’ (1995) 105 *Yale Law Journal* 727, 733 (emphasis added).

implementation of policy considerations seems generally problematic in the First Amendment context.⁷⁸⁸

2.6.2.2 Newsworthiness according to *Shulman v Group W*

Shulman marked a new era in reconciling speech and privacy interests in California.⁷⁸⁹ It had been observed in the aftermath that public disclosure cases were unlikely to survive summary judgments and would never reach a jury.⁷⁹⁰ As we recollect, however, jury decisions were increasingly perceived as a threat to the First Amendment anyway. Thus, some courts had already concluded beforehand that ‘newsworthiness’ was not necessarily a jury issue.⁷⁹¹ The problem, as already sketched during the discussion of the constitutional framework,⁷⁹² is usually to justify why a news item may be generally of public concern whereas sensitive personal information is not.⁷⁹³ How can this task be carried out without resorting to a more fact-sensitive approach as taken, for example, in *Briscoe*?

As will presently appear, the courts gradually replaced newsworthiness tests based on community norms with bright-line ‘logical nexus’ tests. The courts usually assert at the outset of their analysis that a legitimate public concern in the general subject matter of a publication does not render all information given in an account newsworthy.⁷⁹⁴ The Californian Supreme Court, by way of illustration, conceded in *Shulman* that ‘a certain amount of interest-balancing does occur in deciding whether material is

⁷⁸⁸ See P Gielniak, ‘Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment’ (1999) 39 *Santa Clara Law Review* 1217, 1234.

⁷⁸⁹ The decision was described as ‘clearly the most comprehensive state judicial decision concerning the principle of newsworthiness’ - R P Bezanson, ‘The Developing Law of Editorial Judgment’ (1999) 78 *Nebraska Law Review* 754, 778.

⁷⁹⁰ D M Worley, ‘*Shulman v Group W Productions*: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line between Newsworthy Information and Morbid Curiosity’ (1999-2000) 27 *Western State University Law Review* 535, 565.

⁷⁹¹ *Baugh v CBS Inc*, 828 F Supp 745, 754 (1993); *Winstead v Sweeney*, 517 NW 2d 874, 877 (1994) - The Court of Appeals of Michigan held that the newsworthiness element was a mixed question of law and fact; ‘in *certain rare cases*, it is necessary to defer to the fact-finding process to gain a result that is fair and representative of the attitudes of the community’ - emphasis supplied. See also J Elford, ‘Traf-ficking in Stolen Information: A “Hierarchy of Rights” Approach to the Private Facts Tort’ (1995) 105 *Yale Law Journal* 727, 733.

⁷⁹² See above Chapter Two, 1.2.4.

⁷⁹³ See, eg, *Winstead v Sweeney*, 517 NW 2d 874, 877 (1994), *Star-Telegram Inc, v Doe*, 915 SW 2d 471, 474 (1995).

⁷⁹⁴ Eg, *Star-Telegram Inc v Doe*, 915 SW 2d 471, 474 (1995).

of legitimate public concern.’⁷⁹⁵ Based on the facts of the case, this limited amount of balancing was encapsulated in the formula asking whether the disclosed facts ‘bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance.’⁷⁹⁶ This approach supposedly enables courts to decide cases involving persons in events of public interest without balancing interests in an *ad hoc* fashion in each case.⁷⁹⁷ It is therefore not to be mixed up with the proportionality test as employed in England. At least in California, this was a *new* test,⁷⁹⁸ but speech related interests were henceforth generally assessed by reference to this method.⁷⁹⁹ According to one commentator, ‘the fastest growing approach to defining newsworthiness is the “logical nexus” approach.’⁸⁰⁰

This test was first enunciated by the United States Court of Appeals in 1980. In *Campbell v Seabury Press*⁸⁰¹, the defendant published an autobiography concerning the life of a religious and civil rights leader. The plaintiff argued that ‘the defendants tortiously invaded her privacy by including in the autobiography private facts relating to her homelife and marriage with the author’s’ influential older brother.⁸⁰² The Court held that

⁷⁹⁵ *Shulman v Group W Production Inc*, 18 Cal 4th 200, 227 (1998); see also *M G v Time Inc*, 107 Cal Rptr 2d 504, 511 (2001) and *Gates v Discovery Communications Inc*, 131 Cal Rptr 2d 534, 538 (2003).

⁷⁹⁶ *Shulman v Group W Productions Inc*, 18 Cal 4th 200, 215 (1998); see also *M G v Time Inc*, 107 Cal Rptr 2d 504, 513 (2001); *Taus v Loftus*, 40 Cal 4th 683, 718 (2007). For non-Californian authorities see also *Ross v Midwest Communications Inc*, 870 F 2d 271, 274 (1989); *Wilson v Grant* 687 A 2d 1009, 1015; *Gilbert v Medical Econs Co*, 665 F 2d 305, 308 (1981); *Campbell v Seabury Press*, 614 F 2d 395, 397 (1980).

⁷⁹⁷ *Shulman v Group W Productions Inc*, 18 Cal 4th 200, 225-26 (1998); see also K W Bacon, ‘Florida Star v BJJ: The Right of Privacy Collides with the First Amendment’ (1990) 76 *Iowa Law Review* 139, 162 (1990). Compare G L Bostwick, ‘The Newsworthiness Element: *Shulman v Group W Prods., Inc.* Muddies the Waters’ (1999) 19 *Loyola of Los Angeles Entertainment Law Review* 225, 241 who notes that many regard the element of ‘disproportionality’ as inviting a form of *ad hoc* balancing.

⁷⁹⁸ *Shulman v Group W Production Inc*, 18 Cal 4th 200, 251 (1998) per Brown J (concurring and dissenting); D M Worley, ‘*Shulman v Group W Productions*: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity’ (1999-2000) 27 *Western State University Law Review* 535, 565; G L Bostwick, ‘The Newsworthiness Element: *Shulman v Group W Prods., Inc.* Muddies the Waters’ (1999) 19 *Loyola of Los Angeles Entertainment Law Review* 225, 240.

⁷⁹⁹ *Taus v Loftus*, 40 Cal 4th 683, 718 (2007).

⁸⁰⁰ J A Jurata, ‘The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts’ (1999) 36 *San Diego Law Review* 489, 507.

⁸⁰¹ 614 F 2d 395 (1980) (5th Circuit).

⁸⁰² *Campbell v Seabury Press*, 614 F 2d 395, 397 (1980).

[a] review of the record in this action clearly shows the requisite logical nexus. An account of the author's close association with his older brother certainly is appropriate in the autobiography. Likewise, accounts of his brother's marriage as they impacted on the author have the requisite logical nexus to fall within the ambit of constitutional protection.⁸⁰³

In the case of *Gilbert v Medical Economics Company*⁸⁰⁴, the United States Court of Appeals made another effort to explain how the 'logical nexus' test is applied in practice.⁸⁰⁵ The defendant published an article discussing the personal and professional problems of a physician involved in two incidents of alleged medical malpractice. The Court held that the public dissemination of a 'physician's photograph, name, and private facts about her psychiatric history and marital life was substantially relevant to newsworthy topic of policing failures in medical profession and thus was privileged under the First Amendment.'⁸⁰⁶ The Court's reasoning, insofar as is relevant, reads:⁸⁰⁷

With respect to the publication of *plaintiff's photograph and name*, we find that these truthful representations are *substantially relevant to a newsworthy topic* because they strengthen the impact and credibility of the article. They obviate any impression that the problems raised in the article are remote or hypothetical, thus providing an aura of immediacy and even urgency that might not exist had plaintiff's name and photograph been suppressed. Similarly, we find the publication of plaintiff's *psychiatric and marital problems* to be *substantially relevant to the newsworthy topic*. While it is true that these subjects would fall outside the first amendment privilege in the absence of either independent newsworthiness or any substantial nexus with a newsworthy topic, here they are connected to the newsworthy topic by the rational inference that plaintiff's personal problems were the underlying cause of the acts of alleged malpractice.

In brief, the newsworthiness element (as outlined in the Restatement) was gradually replaced with tests focussing on a 'logical nexus' between private information and the newsworthy subject. This development is in line with the observations made in other states that a community mores standard of newsworthiness had to be rejected categorically. As the Supreme Court of Oregon put it: '[t]he editorial judgment of what

⁸⁰³ Ibid.

⁸⁰⁴ 665 F 2d 305 (1981) (10th Circuit).

⁸⁰⁵ Note that Court defined 'nexus' as a 'substantial relevance' in that case - G Dendy, 'The Newsworthiness Defense to the Public Disclosure Tort' (1997) 85 Kentucky Law Journal 147, 163.

⁸⁰⁶ *Gilbert v Medical Economics Company*, 665 F 2d 305 (1981).

⁸⁰⁷ Ibid, at p 308-9 (emphasis added).

is “newsworthy” is not so readily submitted to the *ad hoc* review of a jury as the Court of Appeals believed. It is not properly a community standard.’⁸⁰⁸

As we remember, particularly in the wake of *Bartnicki v Vopper*⁸⁰⁹ scholars have argued that the tort’s viability depends on a balancing exercise by judges and juries based on community mores.⁸¹⁰ However, the determination of speech related interests by means of utilising a newsworthiness standard based on those norms became increasingly problematic.⁸¹¹ Particularly, the notion of ‘redeeming social value’ of speech is suspicious in the First Amendment context.⁸¹² Thus, it is fair to say that such a test cannot be problem and solution to the problem at the same time. One scholar has prognosticated that the ‘logical nexus’ requirement would render, for instance, the former three-prong test as employed by Californian courts in the pre-*Shulman* era extinct.⁸¹³ This seems to be correct.

Shulman was criticised, because the balancing test applied was said to be in fact a ‘bright line “logical relationship test”’; this test, however, ‘fail[ed] to take adequate account [of] individual privacy rights and [was] overly deferential to the press.’⁸¹⁴ The fact that there are no individual privacy rights in the first place is a different matter of course. One commentator argues that the new test is ‘even more amorphous and unworkable than the use of *ad hoc* balancing,’ because there is no indication what criteria determines a ‘logical relationship.’⁸¹⁵ Critics hence suggested that the Californian Courts should not abandon what has been described as *ad hoc* balancing in favour of this bright line test. The rationale behind this suggestion is that generalisation, as pre-

⁸⁰⁸ *Anderson v Fisher Broadcasting Companies Inc*, 712 P 2d 803, 809 (1986).

⁸⁰⁹ 532 US 514 (2001).

⁸¹⁰ R A Smolla, ‘Information as a Contraband: The First Amendment and Liability for Trafficking in Speech’ (2002) 96 *Northwestern University Law Review* 1099, 1110

⁸¹¹ See particularly *Shulman v Group W Productions Inc*, 18 Cal 4th 200, 246 (1998) per Kennard J (concurring)

⁸¹² S Ingber, ‘The Marketplace of Ideas: A Legitimizing Myth’ [1984] *Duke Law Journal* 1, 22; see also J Rubinfeld, ‘The First Amendment’s Purpose’ (2001) 53 *Stanford Law Review* 767, 824.

⁸¹³ J A Jurata, ‘The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts’ (1999) 36 *San Diego Law Review* 489, 506.

⁸¹⁴ P Gielniak, ‘Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment’ (1999) 39 *Santa Clara Law Review* 1217, 1263.

⁸¹⁵ *Ibid*, at p1259; see also D M Worley, ‘*Shulman v Group W Productions*: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity’ (1999-2000) 27 *Western State University Law Review* 535, 564.

supposed by such a bright line test, 'is simply impossible.'⁸¹⁶ *Shulman* was thus interpreted as saying that it 'will completely strip the publication of private facts tort of what little protection it provide[d] to private citizens in California.'⁸¹⁷

To this writer, the critique is persuasive but the critics nevertheless seem to bark up the wrong tree. The Supreme Court of California is not to blame, because the 'logical nexus' test is perhaps the only determination of 'newsworthiness' compatible with current First Amendment doctrine. Consider Kennard J's concurring opinion in *Shulman*:

I do not doubt the need to protect individual privacy against the ever-increasing intrusions upon it. I do question whether the publication of private facts can be prohibited on the basis of the perceived newsworthiness of the facts without creating a conflict with current First Amendment doctrine.⁸¹⁸

In the USA, it is hence a consequent move in light of general hesitation towards contents-based speech restrictions.⁸¹⁹ Nevertheless, 'relevance' or a 'logical nexus' as determinant effectively defers the decision as to which personal information is of public concern to the press.⁸²⁰ Such a relationship to a matter of public concern can always be construed.⁸²¹ In other words, it is another form of Zimmerman's famous 'leave it to the press' model.⁸²² In that case, it might indeed be better writing the tort out of the law.

⁸¹⁶ G L Bostwick, 'The Newsworthiness Element: *Shulman v Group W Prods., Inc.* Muddies the Waters' (1999) 19 *Loyola of Los Angeles Entertainment Law Review* 225, 251.

⁸¹⁷ D M Worley, 'Shulman v Group W Productions: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity' (1999-2000) 27 *Western State University Law Review* 535, 565; but compare J H Fuson, 'Protecting the Press From Privacy' (1999) 148 *University of Pennsylvania Law Review* 629, 652.

⁸¹⁸ *Shulman v Group W Production Inc.*, 18 Cal 4th 200, 246 (1998) per Kennard J (concurring)

⁸¹⁹ See *ibid*, pp 244-6.

⁸²⁰ See R P Bezanson, 'The Developing Law of Editorial Judgment' (1999) 78 *Nebraska Law Review* 754, 785; B C Murchison, 'Revisiting the American action for public disclosure of private facts' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 32, 55.

⁸²¹ E Tison, 'Straddling the Fence: Justice Breyer's concurrence in *Bartnicki v Vopper* gives Protection of Privacy and still Manages to Protect the Press: *Bartnicki v Vopper*, 532 US 514 (2001)' (2003) 27 *Southern Illinois University Law Journal* 661, 683; P Gewirtz, 'Privacy and Speech' [2001] *Supreme Court Review* 139, 174; D M Worley, 'Shulman v Group W Productions: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity' (1999-2000) 27 *Western State University Law Review* 535, 569-70.

⁸²² See D L Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis' (1983) 68 *Cornell Law Review* 291, 353 for further details.

3 Conclusion on the American Law

The examination of the cause of action in US law has been a genuinely interesting experience. The law, admittedly, seemed quite unfamiliar at first sight. Once it had been understood, however, that it is supposed to serve quite distinct goals vis-à-vis this writer's expectations it makes sound sense.

The primary function of the tort is not to provide fair compensation to individual plaintiffs. There is no right to privacy in common law or otherwise. A right to compensation (conferred by making out the action) is narrowly defined and only available under exceptional circumstances. American law thereby meets its primary objectives. It achieves a high degree of predictability by focusing on the liberty interests of defendants, which are tested against rigid rules rigidly applied. Liability is strict unless a fault standard is supplemented by state courts.⁸²³ The security interests of individual plaintiffs in their personal information, in contrast, are largely neglected. This arguably general trait of US tort law is unquestionably exacerbated in the present context. Besides a focus on almost uninhibited private choices generally, the defendant's main countervailing interest in freedom of speech is of primary importance. As a result the tort is, at least for practical purposes, defunct. This is not to say that the public disclosure tort is not pleaded anymore, but the intrusion into seclusion or solitude branch now seems to promise greater protection to plaintiffs.⁸²⁴ One commentator hits the nail on the head when he observes that the USA does not 'have the systemic capability coherently and consistently to set the boundaries for the cause of action, to determine the limits of permissible invasion of human dignity by the publication of truthful matters.'⁸²⁵ Within the confines of the US framework, it is very arguably impossible to protect more than one interest at a time.

Nevertheless, one would have been led astray given that the situation in the USA is turned against the usefulness of a tort protecting against the disclosure of personal information generally. A good example is Keith J's dissenting judgment in *Hosk-*

⁸²³ Eg, *Ozer v Borquez*, 940 P 2d 371, 377 (1997)

⁸²⁴ See, eg, *Turnbull v American Broadcasting Companies Inc*, (2004) 32 *Media Law Reporter* 2442.

⁸²⁵ S W Halpern, 'Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations' (1991) 43 *Rutgers Law Review* 539, 549.

ing. His Honour pointed predominantly to two influential scholarly articles written by Harry Kalven and Diane Zimmerman in order to illustrate the defects of the American cause of action.⁸²⁶ This choice has been met with scepticism in New Zealand, apparently on the ground that the articles are regarded as dated (Kalven's article dates back to 1966, Zimmerman's to 1983). This, however, seems inappropriate principally because it presupposes an intention to alter things for the better. To my eyes, Kalven was remarkably far-sighted in predicting that Prosser's fourfold formulation of the privacy tort would dominate the legal landscape in the USA.⁸²⁷ Almost 20 years later, Zimmerman was right in observing that particularly the implemented community mores standards of the common law were too vague in the First Amendment context and irreconcilable with the general aim of maintaining content neutrality and predictability in order to avoid 'chilling effects.' Therefore, it does not seem unreasonable to assert that the First Amendment has indeed swallowed the tort as Kalven has predicted it. While Keith J's circumspection in this respect is hence to be applauded, the conclusions his Honour has drawn from those observations are open to criticism. As we will see later in further detail, the Judge inferred from them support for his view that no established societal need for such a privacy tort exists in New Zealand. This conclusion is multiply puzzling.

It is obvious that a systemic incapability to respond to a possible societal need should not be mixed-up with its non-existence. One commentator has summarised this notion by observing that the decline of this tort leaves 'a large gap in privacy protection for victims of offensive disclosures of private information.'⁸²⁸ For one thing the US Supreme Court has repeatedly refused to decide the question whether somebody might be held liable for the publication of truthful information facts although it had the opportunity to do so. The limited practical importance of the tort at present is therefore hardly surprising. In the absence of a clear statement from the Court, the lower courts must regard the tort with suspicion. Judges do not question the need to protect privacy against intrusion; they question the compatibility of the newsworthiness element with current

⁸²⁶ *Hosking* [2005] 1 NZLR 1 (CA) paras 211-217.

⁸²⁷ H Kalven, 'Privacy in Tort Law-Were Warren and Brandeis Wrong?' (1966) 31 *Law and Contemporary Problems* 326, 332.

⁸²⁸ A J McClurg, 'Kiss and Tell: Protecting Intimate Relationship Privacy through Implied Contracts of Confidentiality' (2006) 74 *University of Cincinnati Law Review* 887, 888.

First Amendment doctrine.⁸²⁹ Meanwhile the tort's fortune remains pending between theoretical existence and practical non-existence much as one would expect under the circumstances.⁸³⁰ Another puzzle is that some state jurisdictions have indeed adopted the tort no earlier than the late 1990s - despite its blatantly obvious tensions with First Amendment prerogatives. The Supreme Court of Minnesota (acknowledging three branches of the privacy torts at a time) stated, '[a]s society changes over time, the common law must also evolve: It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs.'⁸³¹

In the perception of a mainland European, echoed in the aforementioned statement, the common law is the work of many minds over centuries. The response to this societal need in the USA is naturally the adoption of the formulation laid down in the Restatement however. This formulation, on the other hand, is almost exclusively Prosser's brainchild and an actual development cannot be confirmed. At first glance, it might be argued that the 'publicity' element has been 'developed' by a minority of courts. However, we have also seen that the transformation of the strict liability rule into a standard collapses the element both into the 'private facts' and 'highly offensive to a reasonable person' prerequisite. As a result it is, I think, highly debatable whether this particular formulation of the tort constitutes or can be modified into an appropriate response to such a concern in any society. This holds true quite apart from First Amendment considerations.

To my mind, the true brilliance of the two articles by Kalven and Zimmerman is that they correctly predicted the impact of the horizontally applied First Amendment on communicative torts (such as defamation and the public dissemination branch of the privacy tort). The fact that it took the courts quite a while to translate the implications for common law actions is another matter. We have discussed those implications under the label 'constitutionalisation of private law.' Freedom of speech has always been of high importance in US law, but the key event leading to further decline of the public

⁸²⁹ *Shulman v Group W Production Inc*, 18 Cal 4th 200, 246 (1998) per Kennard J (concurring).

⁸³⁰ *Ibid*, fn 8.

⁸³¹ *Lake v Wal-Mart Stores Inc*, 582 NW 2d 231, 234 (1998).

disclosure tort was *Sullivan v New York Times*⁸³². The implications of that decision finally led to the transformation of community mores tests into, for instance, a bright-line ‘logical nexus’ test in order to determine newsworthiness. At least in California, this development apparently effaced even the small degree of protection offered by the tort.

It is intriguing to observe that the process of constitutionalising the private law – be it in New Zealand, England or the USA – is always triggered off by media law cases involving freedom of speech issues.⁸³³ This development, however, can have grave implications for the development of the law generally. In the perhaps most abstract sense, a constitution is a ‘formal framework of fundamental law that establishes and regulates the activity of governing a state.’⁸³⁴ It might sound pretentious, but in the widest sense such a framework also extends a particular understanding of liberty to the private law sphere. Crudely put, individualism may be (further) emphasised as was the case in the USA or such a framework may seek to reconcile individualism with community needs by demanding a responsible exercise of individual rights. It is therefore of the utmost importance to have a firm grip on the implications of the respective constitutional framework before it should, if at all, govern relationships of purely private actors to some extent.

In this respect, the situation in the USA can be contrasted usefully to the developments in England. Problems do exist and are real, but this writer respectfully shares Richard Mullender’s view that the impact of human rights norms on English law is sometimes overstated. English law should not face severe difficulties as long as venerable traditions, identified by Mullender as ‘qualified deontology,’ are taken into account.⁸³⁵ That is why we have discussed the implications of the ‘neighbour’ principle for present purposes. Similarly, proportionality as a crucial concept of reconciling privacy and freedom speech is originally a retributive concept and means reduced to its

⁸³² 376 US 254 (1964).

⁸³³ The same holds true for the situation in Germany – see BVerfGE 7, 198 (1958) (“Lüth”).

⁸³⁴ M Laughlin, ‘Constitutional Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 183, 184.

⁸³⁵ R Mullender, ‘Tort, Human Rights, and Common Law Culture’ (2003) 23 *Oxford Journal of Legal Studies* 301, 308.

core nothing more than tit-for-tat. With regard to the reconciliation of individual and communal interests, Mullender has noted that

[h]istorically, the common law has been strongly associated with the concept of community. In classical common law theory, the common law was identified as, inter alia, giving institutional expression to a strongly consensual (*Gemeinschaftlich*) view of community (*Lex Communis Angliae*).⁸³⁶

In the light of qualified constitutional rights, a reinterpretation of this tradition seems necessary but Mullender sees an intersection between tort law and the ECHR in classic common law.⁸³⁷ However, English law could also be interpreted in terms of tort theory as incorporating a ‘mixed conception of corrective justice’ and that would be a very competitive and modern conception. Be that as it may, we have already seen that English law thereby reconciles individual and communal interests in a more nuanced manner.

As for New Zealand’s tort, the American position seems to be favoured to a large extent. At least from this writer’s perspective, it nonetheless seems as if New Zealand’s law is rudderless and adrift between the positions taken in the UK and the USA respectively. However, it is difficult to see how the two quite different approaches can be combined to one compelling approach. This is evidenced, for instance, by the implementation of a proportionality balancing exercise alongside a ‘highly offensive to a reasonable person’ test. As for ‘qualified deontology’ we have discussed in epic length that the implications of the neighbour principle were of little, if any, concern to Prosser. In sum, one may harbour doubts that it would be possible for New Zealand judges to carry Prosser’s guttering torch while simultaneously proclaiming outcome-consistency of the case with the NZBoRA. In comparison to the situation in the UK, there is certainly greater hesitation in New Zealand to accept the implications of a (quasi-)constitutional framework. Before we turn to New Zealand’s law itself, however, the impact of the constitutional framework on the English cause of action will be further elucidated.

⁸³⁶ Ibid, at p 312.

⁸³⁷ Ibid, at p 309.

CHAPTER THREE - THE RIGHTS-FRAMEWORK OF THE UK

English courts have so far refrained from acknowledging a freestanding privacy tort. This had been made clear by the decisions of the House of Lords in *Wainwright*⁸³⁸ and later in *Campbell*.⁸³⁹ The courts have nevertheless felt the need to protect individual privacy interests particularly after the advent of the Human Rights Act 1998⁸⁴⁰. They did so by utilising the equitable remedy of breach of confidence. This is not to say that the centrally important arts 8 and 10 of the European Convention on Human Rights 1950⁸⁴¹ were of no importance beforehand. Nevertheless, Britain takes a dualist approach to international law which required formal recognition of those rights by statute to become applicable domestic law.

Early decisions, however, already indicated an unease of the courts to ‘shoe-horn’ privacy under the heading of an action traditionally requiring an obligation of confidence.⁸⁴² It soon became fairly obvious that it would not be possible to extend the reach of the remedy for present purposes without distortion of its traditional features. The conceptual and doctrinal differences between private and confidential information have been discussed elsewhere by more able writers;⁸⁴³ they are not rehearsed here. It is nevertheless important to note that what has often been described as a ‘development’ of existing law soon turned out to be an evolving new cause of action.⁸⁴⁴ Indeed, Lord Nicholls recently seems to have lent credence from the bench to those concerns and

⁸³⁸ *Wainwright v Home Office* [2003] 4 All ER 969 (HL).

⁸³⁹ *McKennitt* [2007] 3 WLR 194 (CA) para 8 per Buxton LJ; *Browne* [2007] 3 WLR 289 (CA) para 21 per Sir Anthony Clarke MR.

⁸⁴⁰ Hereinafter HRA or the Act

⁸⁴¹ Hereinafter ECHR or Convention.

⁸⁴² *Campbell* [2004] 2 All ER 995 (HL) paras 13, 14 per Lord Nicholls; *McKennitt* [2007] 3 WLR 194 (CA) para 8 per Buxton LJ; *Douglas v Hello! Ltd (No 3)* [2006] QB 125 para 53 per Lord Phillips MR.

⁸⁴³ See particularly A Sims, ‘“A Shift in the Gravity Centre”: The dangers of Protecting Privacy through Breach of Confidence’ [2005] *Intellectual Property Quarterly* 27.

⁸⁴⁴ R Bagshaw, ‘Unauthorised Wedding Photographs’ (2005) 121 *Law Quarterly Review* 550, 551; see also N A Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628, 629.

there are now arguably two separate actions for breach of confidence.⁸⁴⁵ During the discussion of the American tort, we have already discussed a possible interpretation of the basic functioning of this action. For the sake of convenience, the elements of this distinct second action may be summarised as follows:

- the claimant must have a reasonable expectation of privacy (his or her right conferred by article 8 ECHR must be engaged);
- (optionally) the defendant must have known or ought to have known that the claimant had such a reasonable expectation;
- the claimant's right of privacy must be balanced, for example, against the defendant's right to freedom of speech conferred by art 10 ECHR (the proportionality balancing exercise).

It is fair to say that this approach goes further as envisaged particularly in *A v B Plc*⁸⁴⁶ where basic guidelines for the protection of private information have been laid down. The following exposition will therefore concentrate on a brief analysis of the effect given to arts 8 and 10 ECHR in the common law sphere. Hence, the analysis will provide suggestions (1) as to whether those rights are applicable in the private law sphere, ie between private litigants; (2) whether their possible application includes the necessity to afford a remedy against intrusion of private life by private actors; and (3) whether the influence exerted by those rights amounts to a duty to render decisions fully compatible with them or is of mere suggestive character.

This discussion will be important with regard to New Zealand's tort because the English experience shows how horizontally applied human rights norms can provide an analytical framework as an alternative particularly to legislation. Horizontally applied rights, then, serve as a formal framework for a constitutionalised common law tort. The common law, as will be suggested, is nevertheless an autonomous source of law. Therefore, I attempt to rebut suggestions to the effect that a horizontal application of human rights has led to a relegation of the common law in the UK.

⁸⁴⁵ *Douglas v Hello! Ltd (No 3)* [2007] 2 WLR 920 (HL) para 255.

⁸⁴⁶ [2002] 2 All ER 545.

1 Positive obligations under the European Convention of Human Rights

Of some importance in this context is the sometimes neglected distinction between ‘positive obligations’ and ‘horizontal effect’ of human rights. Article 1 ECHR requires signatory countries to secure the rights and freedoms of everyone within their jurisdiction.⁸⁴⁷ It is well known that Convention rights protect individuals primarily against state action.⁸⁴⁸ Art 8 ECHR, by way of illustration, therefore places negative obligations on signatory countries to the ECHR, viz, obligations not to interfere with the rights and freedoms of private persons in an arbitrary manner.⁸⁴⁹ A question long left unanswered by the European Court of Human Rights,⁸⁵⁰ however, was as to whether at least selected Convention rights may also place ‘positive obligations’ on a signatory state. A positive obligation may require, for instance, the UK to provide an effective remedy to private persons against interferences of their privacy interests by private people in order to secure respect for private life as protected by art 8 ECHR.⁸⁵¹

Whilst errors in this intricate area are easily understandable, it is important not to confound these ‘positive obligations’ with a ‘direct horizontal effect’ of Convention rights.⁸⁵² State entities like the UK may be subject to ‘positive obligations’ as signatories of a supra-national treaty such as the ECHR.⁸⁵³ However, the ECHR itself has no horizontal effect.⁸⁵⁴ A ‘direct horizontal effect’, in contrast, poses constitutional duties on private persons on a national level to act compatibly with Convention rights such as arts 8 and 10.⁸⁵⁵ This would enable a private actor to compel, for example, English

⁸⁴⁷ For New Zealand see also art 2 ICCPR.

⁸⁴⁸ [2001] 2 All ER 289 para 130 per Sedley LJ.

⁸⁴⁹ Eg, *von Hannover v Germany* (2005) 40 EHRR 1 para 57.

⁸⁵⁰ Hereinafter ECtHR.

⁸⁵¹ See R S Kay, ‘The European Convention on Human Rights and the Control of Privacy Law’ [2005] *European Human Rights Law Review* 466, 475.

⁸⁵² Compare N A Moreham, ‘Privacy and Horizontality: Relegating the Common Law’ (2007) 123 *Law Quarterly Review* 373-378.

⁸⁵³ R Buxton, ‘The Human Rights Act and Private Law’ (2000) 116 *Law Quarterly Review* 48, 53 (‘Therefore the [positive] obligation *remains that of the state*, to legislate or act to provide subjects with protection within the national legal order against the acts of other subjects. That cannot be translated into a *direct right* held by the *applicant against* those *other subjects*’ – emphasis supplied).

⁸⁵⁴ R Singh, ‘Privacy and the Media: The Impact of the Human Rights Bill’ in B S Markesinis (ed), *Protecting Privacy* (1999) 169, 174.

⁸⁵⁵ R Buxton, ‘The Human Rights Act and Private Law’ (2000) 116 *Law Quarterly Review* 48, 54; see also S Gardbaum, ‘Where the (State) Action is’ (2006) 4 *International Journal of Constitutional Law* 760, 768.

courts to provide a remedy against other private persons.⁸⁵⁶ Lord Phillips MR has usefully summarised these distinct issues as follows.⁸⁵⁷

- (1) What obligation does the Convention impose *on the United Kingdom* in relation to the protection of privacy?
- (2) What obligation is placed *on the courts* in respect of the protection of privacy?

The first issue was finally resolved in *von Hannover v Germany*⁸⁵⁸ in favour of a positive obligation posed by art 8 ECHR on the state.⁸⁵⁹ Heretofore, the ECtHR offered no definitive answer although *Earl Spencer v United Kingdom*⁸⁶⁰ had already foreshadowed this outcome.⁸⁶¹ However, until *von Hannover* the position of the Strasbourg Court had been interpreted as saying that a privacy remedy available in purely private legal disputes would be compatible with art 10 ECHR; the Convention would therefore permit but not require such a remedy on a national level.⁸⁶² Gavin Phillipson suggested, sensibly, that the Court of Appeal in *Douglas (No 1)* merely assumed the applicability of art 8 ECHR to disputes between private litigants and did not decide the matter in one way or the other.⁸⁶³ Given that breach of confidence protects confidential relationships – and not privacy – it is difficult to see why this cause of action even had to be interpreted in the light of art 8 ECHR. *Von Hannover* has been interpreted as clarifying that the UK, as a state entity, was henceforth arguably obliged to provide a remedy in order to discharge its positive obligations to secure respect for private life. Given that

⁸⁵⁶ A L Young, 'Remedial and Substantive Horizontality: The Common Law and *Douglas v Hello! Ltd*' [2002] *Public Law* 232, 235. For such a view see, eg, Sir H W R Wade, 'Horizons of Horizontality' (2000) 116 *Law Quarterly Review* 217.

⁸⁵⁷ *Douglas v Hello! Ltd (No3)* [2006] QB 125 para 46 per Lord Phillips MR (emphasis added).

⁸⁵⁸ (2005) 40 EHRR 1 para 57 ('[t]he Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the states to abstain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. [...] That also applies to the protection of a person's picture against abuse by others').

⁸⁵⁹ See also *McKennitt* [2007] 3 WLR 194 (CA) para 9 per Buxton LJ.

⁸⁶⁰ (1998) 25 EHRR CD 105.

⁸⁶¹ G Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726, 729.

⁸⁶² *Ibid.*, fn 26; see also *Douglas v Hello! Ltd (No3)* [2006] QB 125 para 47 per Lord Phillips MR.

⁸⁶³ *Ibid.*

this obligation would be ignored, an individual could complain *against the state* in Strasbourg after having exhausted recourse to national courts or tribunals.⁸⁶⁴

This leads us to the question as to how this positive obligation has been discharged. English courts, as already indicated, already assumed a necessity to take arts 8, 10 ECHR into account.⁸⁶⁵ At that point, however, no English public authority was obliged to provide a freestanding remedy fully compatible with convention rights.⁸⁶⁶ Lord Hoffmann, for instance, stated in *Wainwright v Home Office*⁸⁶⁷ that the invention of a general tort of privacy would pre-empt the controversy about the ‘extent, if any, to which the convention requires *the state* to *provide remedies* for invasions of privacy by persons who are not public authorities.’

The guidelines laid down by Lord Woolf CJ in *A v B Plc* (based on the assumption to pay heed to arts 8, 10 ECHR), however, did not deal exhaustively with the complexities raised by subjecting the common law to human rights norms.⁸⁶⁸ At that time, the courts saw privacy primarily as a limit on freedom of speech and not as an interest that also had to be protected actively against the exercise of this freedom; the resulting balancing of the two interests consequently favoured the freedoms conferred by art 10 ECHR.⁸⁶⁹ In the wake of *von Hannover*, it had therefore been argued that *A v B Plc* was no longer good law. Lord Justice Sedley, speaking extra-judicially, pointed out that the implications of *von Hannover* made ‘it extremely doubtful whether the *Flitcroft* case [the claimant in *A v B Plc* was, as Sedley LJ put it, Gary Who? *Flitcroft*] could now be decided as it was;’ his Lordship went on to state, the implications of *von Hannover* ‘suggest that the use of article 8 simply to plug gaps in the law of confidence, in the

⁸⁶⁴ *McKennitt* [2007] 3 WLR 194 (CA) para 9 per Buxton LJ; see also R Buxton, ‘The Human Rights Act and Private Law’ (2000) 116 *Law Quarterly Review* 48, 49.

⁸⁶⁵ See particularly *A v B Plc* [2002] 2 All ER 545 para 4 per Lord Woolf CJ

⁸⁶⁶ See also *Ibid*; *McKennitt* [2007] 3 WLR 194 (CA) para 10 per Buxton LJ.

⁸⁶⁷ [2003] 4 All ER 969 para 34 (emphasis supplied); see also *Douglas v Hello! (No 1)* [2001] 2 All ER 289 para 166 per Keene LJ.

⁸⁶⁸ G Phillipson, ‘Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously’ (2003) *European Human Rights Law Review* Supp (Special Edition) 54, 55.

⁸⁶⁹ G Phillipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 213-4. See also *McKennitt* [2007] 3 WLR 194 (CA) para 53 per Buxton LJ.

way proposed in the *Wainwright* case, will not do' anymore.⁸⁷⁰ It became increasingly clear that English law was defective without an effective privacy remedy of some kind.⁸⁷¹ Hence, it is fair to suggest that criticising the decisions beginning with *McKennitt* on the ground that they departed significantly from the guidelines as set out in *A v B Plc* is of diminished value.⁸⁷² Although particularly *Campbell* directed the law already into the very same direction, it is suggested to regard *von Hannover* as a caesura in the development of protecting private information in England and Wales.⁸⁷³

It is plain that the English judiciary would have left the development of a free-standing privacy remedy preferably to Parliament. Government nevertheless signalled that no legislation would be introduced in this area, 'but anticipates that the judges will develop the law appropriately, having regard to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms.'⁸⁷⁴ Likewise, the courts repeatedly asserted that a new cause of action would (or could) not be invented.⁸⁷⁵ That seems to have resulted in a bit of a quagmire. Without elaborating this point in greater depth, I should like to venture that it seems advantageous distinguishing between what a common law court is *required* to do under the impact of human rights and what a common law court is *allowed* to do in its capacity as a common law court.⁸⁷⁶ It might be argued that the latter is rather a 'Dicean problem' inasmuch as it is concerned with the unwritten Constitution. At the end of the day, that problem is concerned with the separation of power. Raymond Wacks has observed that recent judgments of the English

⁸⁷⁰ Sir S Sedley, 'Sex, Libels and Video-surveillance' (The Blackstone Lecture 2006) available at www.judiciary.gov.uk/publications_media/speeches/2006/sp130506; last accessed on 16 January 2008.

⁸⁷¹ See J Lewis, 'The European Ceiling on Human Rights' [2007] *Public Law* 720, 741 discussing *Wainwright v the UK* (App. No. 12350/04), judgment of 26 September 2006.

⁸⁷² Compare N A Moreham, 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 *Law Quarterly Review* 373, 374-5.

⁸⁷³ Gavin Phillipson notes, for example, that the Court of Appeal in *Douglas v Hello! Ltd (No3)* [2005] EWCA Civ 595 'emphasised the more transformative aspects of the *Campbell* decision' whereas the 'more conservative dicta' of their Lordships were not cited - 'The 'right' of privacy in England and Strasbourg compared' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 200.

⁸⁷⁴ *Douglas v Hello! Ltd (No3)* [2006] QB 125 para 46 per Lord Phillips MR. See also Sir S Sedley, 'Sex, Libels and Video-surveillance' (The Blackstone Lecture 2006) available at www.judiciary.gov.uk/publications_media/speeches/2006/sp130506.htm on 16 January 2008.

⁸⁷⁵ Eg, *ibid*, para 52 citing *Campbell* [2004] 2 All ER 995 (HL) para 134 per Lady Hale.

⁸⁷⁶ See Sir S Sedley, 'Sex, Libels and Video-surveillance' (The Blackstone Lecture 2006) available at www.judiciary.gov.uk/publications_media/speeches/2006/sp130506; last accessed on 16 January 2008 ('There are well-recognised constitutional objections to the creation by the courts of new torts').

courts had shown ‘the willingness to allow article 8 to thwart the conception of a full-blown privacy tort.’⁸⁷⁷ This argument, if I may say so, is certainly convenient for common lawyers. However, given that Government has signalled ‘we are not going to do anything’ and the courts went ‘we cannot do more than develop existing remedies in our capacity as common law courts,’ this very arguably cannot be correct. It is, then, rather the common law or constitutional restrictions on judges ‘to make the law’ that let Wacks down.⁸⁷⁸ The HRA does not prevent the courts from creating new causes of action in private law, but the Act also does not authorise them to do so.⁸⁷⁹ The Act does not (and very arguably should not) create new private rights. In brief, the common law is an autonomous source of law.

To my mind, the subsequent developments in English law - if development is the word - have to be seen in the light of these parameters. Assuming that this is correct, the courts have nevertheless made the necessary adjustments. Cutting a long story short, the courts have decided that arts 8 and 10 ECHR were no longer of persuasive or parallel effect but are ‘now the very content of the domestic tort.’⁸⁸⁰ Effectively, this ‘development’ has tacitly led to the development of a tort against the dissemination of personal information ‘in all but name.’⁸⁸¹ This holds true regardless of the fact that the courts were presumably inhibited to do so in their capacity as common law courts.

It should be reiterated that a freestanding tort of privacy protecting against the dissemination of personal information would most likely require an autonomous recognition of a common law right to privacy.⁸⁸² However, Lord Hoffmann was only prepared to accept that the traditional breach of confidence action and an action involving

⁸⁷⁷ R Wacks, ‘Why there will never be an English common law privacy tort’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 154, 169.

⁸⁷⁸ Wacks is, of course, aware of the preference of the courts for legislation - *ibid*, at p 181.

⁸⁷⁹ D Pannick and A Lester, ‘The Impact of the Human Rights Act on Private Law: The Knight’s Move’ (2000) 116 *Law Quarterly Review* 380, 384.

⁸⁸⁰ *McKennitt* [2007] 3 WLR 194 (CA) para 11 per Buxton LJ.

⁸⁸¹ G Phillipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 185; S Todd, ‘Review: Tort’ [2004] *New Zealand Law Review* 585, 607; J Morgan, ‘Hello! Again: Privacy and Breach of Confidence’ (2005) *Cambridge Law Journal* 549, 550; see also Sir S Sedley, ‘Sex, Libels and Video-surveillance’ (The Blackstone Lecture 2006) available at www.judiciary.gov.uk/publications_media/speeches/2006/sp130506; last accessed on 16 January 2008.

⁸⁸² See generally *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 para 71 per Laws LJ.

private information should be kept separate; the ‘development’ as regards the protection of private information ‘has been mediated by *the analogy* of the right to privacy’ conferred by art 8 ECHR.⁸⁸³ Lord Nicholls went further and asserted that breach of confidence ‘now covers two distinct causes of action, protecting two different interests: privacy, and secret (“confidential”) information.’⁸⁸⁴ At this point, Lord Justice Sedley’s words are apposite: ‘the distinction between development and innovation [is reduced] to an abstraction.’⁸⁸⁵ That is, of course, old hat in New Zealand and validated the joint judgment’s suggestion in *Hosking*.⁸⁸⁶ Notwithstanding, to provide a private right by analogy to a constitutional right does not seem very convincing. In my respectful view, a common law right to privacy has not been acknowledged so far.⁸⁸⁷

It should be noted, in conclusion, that these ‘developments’ were predominantly the result of discharging a positive obligation of the UK to provide an effective remedy against the dissemination of personal information (including photographs)⁸⁸⁸ by private litigants. A public authority of some kind had to provide such a remedy after all.⁸⁸⁹ In this writer’s respectful view, this should not be confused with a horizontal effect of Convention rights, a matter to which we will turn next.

2 The horizontal effect of the Human Rights Act

It follows from the previous elaboration that we may deal briefly with the distinct issue concerned with the appropriate effect to be given to the HRA. We will never-

⁸⁸³ *Douglas v Hello! Ltd (No 3)* [2007] 2 WLR 920 (HL) para 118 per Lord Hoffmann (emphasis supplied).

⁸⁸⁴ *Ibid*, para 255.

⁸⁸⁵ Sir S Sedley, ‘Sex, Libels and Video-surveillance’ (The Blackstone Lecture 2006) available at www.judiciary.gov.uk/publications_media/speeches/2006/sp130506; last accessed on 16 January 2008. Commentators have recognised early on that the privacy tort would require more than an ‘incremental’ development - J Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ (2003) 62(2) *Cambridge Law Journal* 444, 469.

⁸⁸⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 42 per Gault P and Blanchard J.

⁸⁸⁷ But see N A Moreham, ‘Privacy in Public Places’ (2006) 65(3) *Cambridge Law Review* 606, 606, 610; compare also her ‘Recognising Privacy in England and New Zealand’ (2004) 63(3) *Cambridge Law Journal* 555.

⁸⁸⁸ In *von Hannover v Germany* (2005) 40 EHRR 1 para 72, the ECtHR stated that Germany had to comply with ‘its positive obligation under the Convention to protect private life and the right to control the use of one’s image.’

⁸⁸⁹ See also *Douglas v Hello! Ltd (No 5)* [2003] 3 All ER 996 (Ch) para 229 per Lindsay J.

theless discuss this matter, because the aforementioned transformation of the English law has been described as being brought about by a ‘direct horizontal effect’ of the Act.⁸⁹⁰ That, however, is imprecise. It is nevertheless apt to observe that arts 8 and 10 ECHR now provide the framework to what Lord Nicholls has referred to as the tort of ‘misuse of private information.’⁸⁹¹ As will presently appear, the English courts have given ‘strong indirect effect’ to arts 8 and 10 ECHR.

In order to comprehend the, in my view, correct impact, we will initially clarify the relationship of the HRA and ECHR. Section 1 (1)(a) HRA sets out that arts 2 to 12 and 14 ECHR – therefore including privacy protected under art 8 of the Convention as well as freedom of speech (art 10) - are to have effect as Convention rights for the purposes of the Act. The Act therefore does not ‘incorporate’ Convention rights into English law but gives ‘further effect’ to them.⁸⁹² According to s 2 (1)(a) HRA, the English courts have to take the case law of the ECtHR into account when interpreting the domestic HRA.⁸⁹³ Whilst the UK is bound by Strasbourg jurisprudence by way of art 46 (1) ECHR the English courts are not.⁸⁹⁴ Section 6 (1) HRA, however, reinforces the obligation to take the European jurisprudence into account. Section 6 (3)(a) HRA attributes the status of a ‘public authority’ to the courts and imposes a duty of acting compatibly with Convention rights. This also holds true even in disputes between private litigants governed by the common law.⁸⁹⁵ At least for the purposes of this analysis it is fair to say that the HRA is largely parasitic on the Convention.⁸⁹⁶

Notwithstanding, the wording of s 6 (1) HRA makes it immediately clear that a direct horizontal effect *erga omnes* was not intended.⁸⁹⁷ The HRA places no duties on

⁸⁹⁰ N A Moreham, ‘Privacy and Horizontality: Relegating the Common Law’ (2007) 123 *Law Quarterly Review* 373, 375.

⁸⁹¹ *Campbell* [2004] 2 All ER 995 (HL) para 14.

⁸⁹² J Lewis, ‘The European Ceiling on Human Rights’ [2007] *Public Law* 720, 724.

⁸⁹³ See also *Venables and another v News Group Newspapers and others* [2001] 1 All ER 908, 917 per Dame Butler-Sloss P.

⁸⁹⁴ J Lewis, ‘The European Ceiling on Human Rights’ [2007] *Public Law* 720, 729; F Klug, ‘A Bill of Rights: Do we need one or do we already have one’ [2007] *Public Law* 701, 706.

⁸⁹⁵ M Hunt, ‘The “Horizontal Effect” of the Human Rights Act’ [1998] *Public Law* 423, 440.

⁸⁹⁶ G Phillipson, ‘Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously’ (2003) *European Human Rights Law Review Supp* (Special Edition) 54, 56.

⁸⁹⁷ M Hunt, ‘The “Horizontal Effect” of the Human Rights Act’ [1998] *Public Law* 423, 438; D Pannick and A Lester, ‘The Impact of the Human Rights Act on Private Law: The Knight's Move’ (2000) 116

purely private actors.⁸⁹⁸ Hargreaves, a private person, does for example not owe Simpkins a duty to respect and uphold her freedom of speech.⁸⁹⁹ Hargreaves may therefore not claim for an unwarranted interference with this right directly under art 10 ECHR. Instead, she has to rely on existing private law already regulating her relationship with Simpkins in some way. Nowadays, it is trite law that the HRA precludes such a ‘direct horizontal effect.’⁹⁰⁰

This, of course, does not preclude an indirect horizontal effect and the vexed question is rather if and to which extent the Act should impact upon existing remedies in common law disputes between private litigants. For the sake of brevity it is fair to say that s 6 HRA is generally regarded as obliging the courts to give effect to convention rights.⁹⁰¹ As for freedom of speech, this result is fortified by s 12 HRA.⁹⁰² Section 12 (4) HRA provides that the court must have particular regard to the importance of freedom of expression in any decision where granting relief might affect art 10 ECHR. Moreover, judges are also obliged by s 12 (4)(b) HRA to have particular regard to any relevant privacy code.⁹⁰³ According to Sedley LJ, sub-s (4) therefore puts ‘beyond question the direct applicability of at least one article of the convention as between one private party to litigation and another - in the jargon, its horizontal effect.’⁹⁰⁴ The following reasoning of the Judge already suggests, however, that his reference to a ‘direct application’ was not intended to imply a direct horizontal effect of art 10 ECHR.⁹⁰⁵

Law Quarterly Review 380, 383; R Singh, ‘Privacy and the Media: The Impact of the Human Rights Bill’ in B S Markesinis (ed), *Protecting Privacy* (1999) 169, 186.

⁸⁹⁸ Eg, A L Young, ‘Remedial and Substantive Horizontality: The Common Law and *Douglas v Hello! Ltd*’ [2002] *Public Law* 232, 234.

⁸⁹⁹ See J Coppel, *The Human Rights Act 1998* (2000) para 2.37 at p 28.

⁹⁰⁰ Eg, *Venables and another v News Group Newspapers and others* [2001] 1 All ER 908, 918 per Dame Butler-Sloss P; Lord Steyn, ‘Democracy through Law’ [2002] *European Human Rights Law Review* 723, 733. But see *Douglas v Hello! (No 1)* [2001] 2 All ER 289 para 133 per Sedley LJ.

⁹⁰¹ Eg, *Campbell* [2004] 2 All ER 995 (HL) para 114 per Lord Hope; *Douglas v Hello! (No 1)* [2001] 2 All ER 289 para 166 per Keene LJ; *Murray* [2007] EMLR 583 (Ch) para 18 per Patten J. Compare R Buxton, ‘The Human Rights Act and Private Law’ (2000) 116 *Law Quarterly Review* 48 who argues that Convention rights have no indirect effect.

⁹⁰² *Campbell* [2004] 2 All ER 995 (HL) para 114 per Lord Hope

⁹⁰³ *Ibid*, para 159.

⁹⁰⁴ *Douglas v Hello! (No 1)* [2001] 2 All ER 289 para 133.

⁹⁰⁵ *Ibid*, para 139 (‘Article 8 of the convention, whether introduced indirectly through s 12 or directly by virtue of s 6 of the Human Rights Act, will of course require the court to consider ‘the rights and freedoms of others’, including the art 10(1) right of *Hello!*. And art 10, by virtue of ss 6 and 12, will require the court, if the common law did not already do so, to have full regard to *Hello!*’s right to freedom of expression’).

Most importantly, the courts later held that s 12 (4) HRA does not give the art 10(1) right of free expression a presumptive priority over other rights.⁹⁰⁶

However, scholars divide the ‘indirect effect’ further into the ‘strong indirect effect’ and a ‘weak indirect effect.’⁹⁰⁷ The ‘strong indirect effect’ describes a duty of the courts under s 6 (1) HRA to render the common law compatible with Convention rights; a weaker indirect impact would just require the courts to consider Convention principles.⁹⁰⁸ In other words one may ask whether the courts’ obligations under s 6 (1) HRA are already satisfied by taking the relevant Convention rights into account or whether the impact of the human rights instrument overrides existing common law principles.⁹⁰⁹

Sedley LJ, for instance, opined in *Douglas (No 1)*⁹¹⁰ that the courts must themselves act compatibly with relevant Convention rights. His Lordship therefore advocated a ‘strong indirect effect.’⁹¹¹ Keene LJ, on the other hand, suggested that the English Courts may have an obligation to ‘take account of the right to respect for private and family life.’⁹¹² His Lordship thereby paraphrased a weaker impact of Convention rights on the common law.⁹¹³

Statements of the courts in the wake of *von Hannover* indicate a settlement on a strong indirect impact in this particular context. There was, however, already a tendency to this effect in *Campbell*; Lord Hoffmann has summarised the underlying rationale by stating that his Lordship could ‘see no logical ground for saying that a person

⁹⁰⁶ *Campbell* [2004] 2 All ER 995 (HL) para 111 per Lord Hope

⁹⁰⁷ G Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’ (2003) 66 *Modern Law Review* 726, 730.

⁹⁰⁸ *Ibid.*

⁹⁰⁹ G Phillipson, ‘Judicial Reasoning in Breach of Confidence Cases Under the Human Rights Act: Not Taking Privacy Seriously’ (2003) Supp (Special Edition) *European Human Rights Law Review* 54, 59-60; see also *Douglas v Hello! (No 1)* [2001] 2 All ER 289 para 128 per Sedley LJ.

⁹¹⁰ *Douglas v Hello! (No 1)* [2001] 2 All ER 289 para 111.

⁹¹¹ G Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’ (2003) 66 *Modern Law Review* 726, 730; this also seems to be the opinion of J Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ (2003) 62(2) *Cambridge Law Journal* 444, 467.

⁹¹² *Douglas v Hello! (No 1)* [2001] 2 All ER 289 para 167.

⁹¹³ For a more comprehensive discussion of indirect horizontal effect in earlier decisions see generally G Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’ (2003) 66 *Modern Law Review* 726, 730-2.

should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification.⁹¹⁴ In abstract terms, his Lordship describes a symmetrical nature of state intervention. ‘Symmetrical’ means that the responsibility individual agents owe each other is essentially the same form of responsibility that public agents (state/government) owe to an individual.⁹¹⁵ A private individual may nevertheless proffer justifications for her actions that are not available to the state.⁹¹⁶ In other words, the autonomy interests of private actors have to be taken into account when limits on particular rights are determined.⁹¹⁷

Emblematic of the post-*von Hannover* law is Buxton LJ’s statement in *McKennitt*: ‘in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of Arts 8 and 10.’⁹¹⁸ However, ‘breach of confidence’ should be understood in the light of Lord Nicholls’ subsequent suggestion in *Douglas*⁹¹⁹ as referring to the distinct second action protecting private information. Strong indirect effect means, indeed, that the common law rules or guidelines as elaborated for instance in *A v B Plc* were henceforth rendered nugatory. As we have noted, the very essence of the strong indirect horizontal effect is ensuring full compatibility of the court’s decision with Convention rights. As Buxton LJ put it in *McKennitt*:⁹²⁰

in a case [...] where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by Art.8? If no, that is the end of the case. If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher under Art. 10?

The guidelines set out by Lord Woolf CJ, however, were *not* fully compatible for reasons suggested before. Their replacement was therefore a normal effect of the ‘*strong indirect effect*’; it is, however, by no means to be confused with a ‘*direct hori-*

⁹¹⁴ *Campbell* [2004] 2 All ER 995 (HL) para 50.

⁹¹⁵ C Bird, *The Myth of Liberal Individualism* (1999) 113.

⁹¹⁶ *Campbell* [2004] 2 All ER 995 (HL) para 50 per Lord Hoffmann.

⁹¹⁷ Eg, G Phillipson, ‘The Human Rights Act, ‘Horizontal effect’ and the Common Law: a Bang or a Whimper’ (1999) 62 *Modern Law Review* 824, 846.

⁹¹⁸ *McKennitt* [2007] 3 WLR 194 (CA) para 11.

⁹¹⁹ *Douglas v Hello! Ltd (No 3)* [2007] 2 WLR 920 (HL) para 255.

⁹²⁰ *McKennitt* [2007] 3 WLR 194 (CA) para 11.

zontal effect’ of Convention rights.⁹²¹ Phillipson is right that the determination of ‘compatibility’ in turn depends on how these rights are conceptualised.⁹²² In this respect, it is important to reiterate that these indirectly applied rights operate as principles conferring an ‘ideal ought;’ as such, they have to be optimised to the greatest extent possible by means of applying the proportionality principle.⁹²³ In other words, even a strong indirect horizontal effect of qualified Convention rights does not lead to an operation of these rights as rules.⁹²⁴

Yet another issue is that the ECtHR has also extended the *reach* of art 8 ECHR in *von Hannover*.⁹²⁵ As Eady J stated in *McKennitt v Ash*, ‘it is clear that there is a significant shift taking place as between, on the one hand, freedom of expression for the media and the corresponding interest of the public to receive information, and, on the other hand, the legitimate expectation of citizens to have their private lives protected.’⁹²⁶ Under s 2(1) HRA, the English courts are obliged to take the decisions of the ECtHR into *account*, but they are not *bound* by them.⁹²⁷ Section 6 (1) HRA ensures a minimum level of protection whereas s 2 (1) of the Act embodies the ‘margin of appreciation.’⁹²⁸ However, inasmuch as the Strasbourg jurisprudence is clear and consistent, several judges opined that the jurisprudence should be followed.⁹²⁹ This makes perfect sense because the UK would be in breach of its duties under the Convention if it were otherwise. The rights were after all ‘brought home’, which means that they cannot confer less protection on a national level than they would enjoy in Strasbourg; the English

⁹²¹ Compare N A Moreham, ‘Privacy and Horizontality: Relegating the Common Law’ (2007) 123 *Law Quarterly Review* 373, 375.

⁹²² G Phillipson, ‘The Human Rights Act, ‘Horizontal effect’ and the Common Law: a Bang or a Whimper’ (1999) 62 *Modern Law Review* 824, 843.

⁹²³ R Alexy, ‘Balancing, Constitutional Review, and Representation’ (2005) 3 *International Journal of Constitutional Law* 572, 572-3.

⁹²⁴ But see G Phillipson, ‘The Human Rights Act, ‘Horizontal effect’ and the Common Law: a Bang or a Whimper’ (1999) 62 *Modern Law Review* 824, 832.

⁹²⁵ See *McKennitt* [2007] 3 WLR 194 (CA) para 37 per Buxton LJ.

⁹²⁶ *McKennitt* [2006] EMLR 178 (QB) para 57.

⁹²⁷ For a helpful summary on these issues see generally R Mullender, ‘Tort, Human Rights, and Common Law Culture’ (2003) 23 *Oxford Journal of Legal Studies* 301, 302-3.

⁹²⁸ R Masterman, ‘Taking the Strasbourg Jurisprudence into Account: Developing a “Municipal Law of Human Rights” under the Human Rights Act’ (2005) 54 *International and Comparative Law Quarterly* 907, 908-9.

⁹²⁹ *Ibid*, at 931.

courts can, of course, grant greater protection.⁹³⁰ It is, I think, for this reason that the English courts now have to look in the jurisprudence of arts 8 and 10 ECHR first.

Notwithstanding, from a national perspective the notion of ‘clear and consistent’ Strasbourg jurisprudence may leave some European lawyers with a bit of a tickle in their throat. The ECtHR has left the scope of art 8 ECHR long unexplored.⁹³¹ It is rather unlikely that a signatory country can rely exclusively on ECtHR jurisprudence. Much rather the judges’ task

is not to cast around in the European Human Rights Reports like black letter lawyers seeking clues. In the light of s 2(1) of the HRA, it is to draw out the broad principles which animate the Convention.⁹³²

To the present writer, those ‘broad principles’ are in this particular context first and foremost freedom of speech and informational privacy. The voice of reason, for what it is worth, would suggest that the analytical framework provided by both articles has much to recommend it. Similar to the law of negligence, this is a very context sensitive area of the law. Both privacy and freedom of speech are now rights expressed in open-textured language.⁹³³ Quite apart from the influence of any Strasbourg jurisprudence it is, I think, most important to acknowledge that each case must be decided on its specific facts. The English judges have said as much.⁹³⁴

⁹³⁰ See F Klug, ‘A Bill of Rights: Do we need one or do we already have one’ [2007] *Public Law* 701, 707.

⁹³¹ J Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ (2003) 62(2) *Cambridge Law Journal* 444, 447; for a general discussion see R Masterman, ‘Taking the Strasbourg Jurisprudence into Account: Developing a “Municipal Law of Human Rights” under the Human Rights Act’ (2005) 54 *International and Comparative Law Quarterly* 907, 915-7.

⁹³² *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] 3 WLR (CA) 1323 para 44 per Sir Andrew Morritt.

⁹³³ See also R Masterman, ‘Taking the Strasbourg Jurisprudence into Account: Developing a “Municipal Law of Human Rights” under the Human Rights Act’ (2005) 54 *International and Comparative Law Quarterly* 907, 914.

⁹³⁴ Eg, *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) para 90 per Blackburne J; *Murray* [2007] EMLR 583 (Ch) para 23 per Patten J; *Browne* [2007] 3 WLR 289 (CA) paras 17, 26 per Sir Anthony Clarke MR.

It is undoubtedly arguable to regard all this as a ‘relegation’ of the common law.⁹³⁵ As the author understands it, it would - in this particular area - nevertheless only relegate a particular way of thinking about the common law inasmuch as it is concerned with ‘rules’⁹³⁶ and an incremental development. The possibility of such an incremental development is most likely as much an illusion as it is in negligence. Particularly the promise of this approach to provide greater certainty of the law may leave one as a, say, doubting Thomas.⁹³⁷ Hence, the jeremiad of ‘relegating the common law’ sounds like the beginning of the ‘retreat from *Anns* vol 2’ to this writer. This would of course sound the knell for everything an approach based on principles stood for in the first place.

It is suggested, in conclusion, that English law provides a compelling approach to protect two equally valuable interests. Moreover, this jurisdiction sets an illustrative example of a ‘constitutionalised common law tort.’ The common law, as we have seen, is an autonomous source of law. Nevertheless, arts 8 and 10 ECHR provide an analytical framework if they are conceptualised and used meaningfully. This formal framework enables an approach based on principle, which seems advantageous with regard to the context specific nature of the conflict between interests in free speech and privacy. The framework is formal, because it is derived from a quasi-constitutional instrument, that is to say that individual judges may not simply change the approach as they wish. In England since the decision in *Campbell*, for instance, all judges stick to what has become known as the ‘new methodology’⁹³⁸ and therefore accept the formal framework. At last, we can turn to New Zealand’s legal landscape.

⁹³⁵ N A Moreham, ‘Privacy and Horizontality: Relegating the Common Law’ (2007) 123 *Law Quarterly Review* 373, 375.

⁹³⁶ *Ibid.*, at p 376.

⁹³⁷ For a formidable discussion see generally E W Thomas, ‘A Return to Principle in Judicial Reasoning and an Acclamation of judicial Autonomy’ (1993) 23 *Victoria University of Wellington Law Review* Monograph 5, pp 10-6.

⁹³⁸ Eg, *McKennitt* [2006] EMLR 178 (QB) para 48 per Eady J.

CHAPTER FOUR - THE LAW OF NEW ZEALAND

While discussing the relevant law of New Zealand, we principally stick to the familiar distinction between macro- and micro-level analysis. Consequently, the functioning of the Bill of Rights Act as New Zealand's quasi-constitutional framework and its effect on the common law will be illuminated first. I seek to demonstrate that a compelling interpretation of the Act has not been found so far. It will be shown that New Zealand's human rights instrument bears striking similarities to ECHR while significant differences to the US Constitution exist. Our analysis will then focus on the common law action itself. New Zealand, as already indicated, has effectively adopted two torts in Hosking. I attempt to establish that only the version following the British approach is consistent with the NZBoRA.

1 The privacy tort in New Zealand's constitutional framework

1.1 The Bill of Rights Act

New Zealand has no single document identifiable as a written constitution, but a constitutional framework has nevertheless been established.⁹³⁹ It is provided by a number of disparate sources such as legislation, the common law, the Treaty of Waitangi and others.⁹⁴⁰ Since Parliament is the supreme lawmaking body, statutes are most important among these sources. Particularly the New Zealand Bill of Rights Act 1990 is a New Zealand Act of constitutional significance.⁹⁴¹ The Act, as we will see, played a significant role in the process of recognising and shaping the invasion of privacy tort. Animated by the Canadian Charter of Rights and Freedoms 1982 and the ratification of the International Covenant on Civil and Political Rights 1966 in 1978, the government

⁹³⁹ M McDowall and D Webb, *The New Zealand legal system: Structure and Processes* (4th ed, 2006) 96-7.

⁹⁴⁰ *Ibid*, at p 112.

⁹⁴¹ *Ibid*, at p 134.

issued a White Paper, *A Bill of Rights for New Zealand*, in 1985.⁹⁴² Although the Draft Bill was not entrenched as supreme law, it was affirmed as an Act of Parliament with a similar catalogue of civil and political rights in 1990.⁹⁴³ The Act is best described as a quasi-constitutional instrument.⁹⁴⁴

In the last two Chapters, I have sought to show that the impact exerted by human or constitutional rights on the common law of the UK and the USA is decisive. As we know, scholars describe this phenomenon as the ‘constitutionalisation of private law.’⁹⁴⁵ Similarly, the Court of Appeal’s decision in *Hosking* is not only significant for the law of torts; it represents simultaneously a step towards the ‘quasi-constitutionalisation’⁹⁴⁶ of private law. With regard to the decision’s latter significance, New Zealand generally faces the same problems as the aforementioned legal systems. However, an application of the human rights instrument to the common law would normally require certainty about the accurate interpretation of the instrument itself. Granting this clarity could be described as ‘Phase I’ of a process, which might be followed by the constitutionalisation of the common law as ‘Phase II.’ Issues relevant to ‘Phase I’ include the adequate impact of the NZBoRA on the common law, the appropriate interpretation of the scope of freedom of expression, clarity about the limitation-process and the relationship between rights and limits. A lack of clarity, in contrast, means that the private law would be constitutionalised without perceiving what the quasi-constitutional instrument demands. In other words, a constitutionalisation of the common law would be premature.

⁹⁴² M McDowall and D Webb, *The New Zealand legal system: Structure and Processes* (4th ed, 2006) 140.

⁹⁴³ P A Joseph, *Constitutional and Administrative law in New Zealand* (2nd ed, 2001) 1020-1.

⁹⁴⁴ P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 101.

⁹⁴⁵ B S Markesinis and S Enchelmaier, ‘Human Rights under German Constitutional Law’ in B S Markesinis (ed), *Protecting Privacy* (1999) 191, 240; G Samuel, ‘The impact of European integration on private law - a comment’ (1998) 18(2) *Legal Studies* 167 – see this article for a thorough analysis of the term’s meaning for civil and common-law lawyers. For a sceptical view on the use of this term see H Collins, ‘Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization’ <<http://www.lse.ac.uk/collections/law/wps/WPS06-2007Collins.pdf>> 13 March 2008.

⁹⁴⁶ Hereinafter ‘constitutionalisation’.

The potential effect of the NZBoRA on the common law sphere has not been subject to the sustained discussion found in the UK.⁹⁴⁷ The remaining uncertainties are reflected in *Hosking*. As we will see in due course, all Judges referred to the Act and its importance, but they did not reach consensus on the aforementioned issues. *Hosking* rather displays considerable uncertainties about the handling of these matters, which led to sharp differences and diverging paths.⁹⁴⁸ Since most judgments⁹⁴⁹ fell short of discussing ‘Phase I’-issues, it is necessary to pay heightened attention to these matters in the following. Nevertheless, these observations may prove illuminating in order to identify the underlying issues, which is in turn necessary to explain the occasionally fine differences between the positions of the Judges.

As a result, it will be argued that all Judges at least incidentally conceded a horizontal effect to the NZBoRA. Opinions on the adequate impact of the Act, however, were split. The minority arguably advocated direct impact. In the majority, Tipping J favoured a comparatively strong indirect influence of the Act whilst Gault P and Blanchard J favoured a weak indirect effect. However, it will be argued that it is not necessary to distinguish these two positions of the majority. Instead, the author attempts to demonstrate that it makes a difference whether the Act is applied on long-standing common law or on the acknowledgement of a new tort. With regard to the latter, as will be suggested, there are no reasons identifiable why the courts may depart from the implications of the horizontally applied framework.

1.1.1 The horizontal effect of the NZBoRA

In the following, the important issue why the NZBoRA should have any influence on the acknowledgement and shape of the new privacy tort will be examined. Its application is not apparent since the privacy tort would be part of the common law.⁹⁵⁰ As we have seen during the discussion of the legal system of the UK, the affirmed rights and freedoms are traditionally understood to have a vertical effect. The term de-

⁹⁴⁷ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*’ [2004] *New Zealand Law Review* 681, 686.

⁹⁴⁸ See U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 247.

⁹⁴⁹ The judgment of Tipping J is an exception for reasons suggested below.

⁹⁵⁰ See P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 100.

scribes the protection of citizens against breaches by public authorities.⁹⁵¹ An invasion of privacy tort, in contrast, would lead to court action between two private litigants and the only public authority involved is the court.⁹⁵² This combination of factors does not fall within the vertical effect of a human rights instrument and, at first sight, excludes the NZBoRA from governing such a dispute.

Extending the impact of the NZBoRA to these disputes would mean that the Act has an additional horizontal effect. As for English law, Jonathan Morgan has argued that this additional effect is perhaps most influential in the context of protecting privacy interests.⁹⁵³ Thus, the matter demanded some judicial explanation in *Hosking*.⁹⁵⁴ The first relevant question in this context therefore is whether the NZBoRA has a relevant additional horizontal effect, which would mark the protection of citizens against one another during private litigation.⁹⁵⁵

An affirmative answer to the first question raises almost automatically the query as to how determinative the Act should be for the court's decision.⁹⁵⁶ If the NZBoRA requires, for instance, a certain interpretation of the scope of freedom of expression as affirmed in s 14, this analysis has to be reflected to a certain degree in the public interest/public concern feature of a privacy tort depending on the influence of the Act.⁹⁵⁷ In brief, a decision on this point affects the shape of the new common law rule. Before we may turn to these issues, however, the protection of privacy and freedom of speech within New Zealand's quasi-constitutional framework will be discussed first.

⁹⁵¹ A Geddis, 'The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*' [2004] *New Zealand Law Review* 681, 682; S Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387, 394.

⁹⁵² See P A Joseph, *Constitutional and Administrative Law* (2nd ed, 2001) ch 26.4 (5)(b).

⁹⁵³ J Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62(2) *Cambridge Law Journal* 444, 467.

⁹⁵⁴ K Evans, 'Was Privacy the Winner of the Day?' [2004] *New Zealand Law Review* 181, 182.

⁹⁵⁵ J Norton, 'Hosking v Runting and the Role of Freedom of Expression' [2004] *Auckland University Law Review* 245, 248.

⁹⁵⁶ A Geddis, 'The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*' [2004] *New Zealand Law Review* 681, 696.

⁹⁵⁷ With regard to the German law, it had been observed that the ambit of the basic rights enshrined in the *Grundgesetz* (BasicLaw) have the same ambit in the public as well as in the constitutionalised private area – B S Markesinis and S Enchelmaier, 'Human Rights under German Constitutional Law' in B S Markesinis (ed), *Protecting Privacy* (1999) 191, 211.

1.1.2 Privacy, freedom of speech and the NZBoRA

The impact of the NZBoRA on the new privacy tort is most relevant when it comes to the limitation of freedom of expression. Before turning to this issue, the recognition of privacy and freedom of expression within the NZBoRA will be illuminated. As in presumably every democratic society, freedom of speech has been granted recognition in the NZBoRA. Because of its central fundamental stature, it has had already a long history within the Anglo-New Zealand legal tradition before the Act came into force.⁹⁵⁸ Section 14 reads:

‘Everyone has the right of freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and form.’

The wording of this section has been taken from the corresponding clause 7 of the White Paper Draft Bill. The commentary on clause 7 confirms the central importance of freedom of expression but states that the freedom might conflict with other public or private interests.⁹⁵⁹ Laws like those of the various unlawful libels anticipate a threat to other interests and therefore control particularly speech interests for that reason.⁹⁶⁰ This already indicates that freedom of speech is not an absolute right in New Zealand.⁹⁶¹

None of the provisions contained in the NZBoRA confirms a general right to privacy.⁹⁶² New Zealand is arguably ‘unusual’ in this respect.⁹⁶³ However, an aspect of privacy has been affirmed in s 21, which protects everyone against unreasonable search and seizure of the person, property, correspondence or otherwise.⁹⁶⁴ The drafters nonetheless did not envisage granting a general right to privacy, although specific rules of

⁹⁵⁸ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 13.2.1.

⁹⁵⁹ Minister of Justice, *A Bill of Rights for New Zealand - A White Paper* (1985) para 10.57.

⁹⁶⁰ See also *Hansen v R* [2007] 3 NZLR 1 (SC) para 263 per Anderson J

⁹⁶¹ See also *Hosking* [2005] 1 NZLR 1 (CA) para 113 per Gault P and Blanchard J; *Hansen v R* [2007] 3 NZLR 1 (SC) para 187 per McGrath J.

⁹⁶² White Paper, para 10.144; *R v Jeffries* [1994] 1 NZLR 290, 302 (CA) per Richardson J.

⁹⁶³ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 13.16.1.

⁹⁶⁴ This section could be traced back to art 19 of the Draft Bill. The comment on this article defines this freedom as an aspect of individual privacy - White Paper, para 10.144.

law and legislation already protected aspects of it at that time.⁹⁶⁵ The attempt to entrench a right that is ‘not by any means fully recognised now, which is in the course of development, and whose boundaries would be uncertain and contentious’ seemed inappropriate.⁹⁶⁶ Two scholars later consequently suggested that it would be wrong to interpret s 21 as providing a general protection of personal privacy; the section rather focuses on law enforcement activities.⁹⁶⁷

Moreover, ss 10 and 11 have been interpreted as saying that they recognise the right to dignity and security of the person, although without direct reference to the wording. According to the Butlers, this interpretation includes aspects of a right to privacy.⁹⁶⁸ Nevertheless, even a broad interpretation of these sections seems to be limited inasmuch as they protect ‘the making of personal decisions about medical treatment and investigation.’⁹⁶⁹ A connection to the dissemination of personal information therefore cannot be inferred from these provisions.⁹⁷⁰ It is after all fair to conclude that neither a general right of privacy has been embodied in the NZBoRA nor has an aspect of privacy protecting against the public disclosure of private information been recognised.

Given that this observation marks our starting point, New Zealand’s framework has more in common with the Federal Constitution of the USA than with the British framework provided by HRA/ECHR. The latter, as we know, has given further effect to a right of privacy as affirmed in art 8 ECHR whereas the Fourth Amendment to the Federal Constitution merely protects a citizen against certain search and seizure measures. Against this background, it is perhaps not a coincidence that Tipping J’s reasoning on carving out recognition of the privacy value is astonishingly similar to the recogni-

⁹⁶⁵ White Paper, para 10.144.

⁹⁶⁶ Ibid, para 10.144; see also A Geddis, ‘Hosking v Runtig: A Privacy Tort for New Zealand’ (2005) 13 *Tort Law Review* 5, 7-8.

⁹⁶⁷ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 18.6.1. The main reasons given for this interpretation is the classification of s 21 under the subheading ‘search, arrest, and detention’ and the emphasis on the regulation of criminal procedure - at para 18.6.4; see also *Katz v United States*, 389 US 347, 350 (1967).

⁹⁶⁸ Ibid, para 11.6.1.

⁹⁶⁹ Ibid, para 11.6.2.

⁹⁷⁰ The reference to human dignity and autonomy is nevertheless relevant with regard to the recognition of privacy values within the Act.

tion of constitutional ‘privacy’ interests in the US case of *Griswold v Connecticut*.⁹⁷¹ Tipping J stressed that those values involved in the concept of privacy are important to New Zealand society.⁹⁷² According to his Honour, the value of privacy may have been ‘recognised less directly, but no less significantly.’⁹⁷³ The values underpinning s 21 and New Zealand’s international obligations can be extended to unreasonable intrusions into personal privacy by ‘reasonable analogy.’⁹⁷⁴ This observation is akin to the ‘penumbras’ of the First, Fourth and Fifth Amendment, as identified by the majority of the *Griswold* Court. These enumerated rights, as we know, have ‘created zones of privacy.’⁹⁷⁵ The argumentation of the minority in *Hosking*, by contrast, roughly resembles Black and Stevens JJ’s dissenting opinion in *Griswold*.⁹⁷⁶ Anderson and Keith JJ emphasised the deliberate omission of an explicit right to privacy and the requirement of legislative action if an aspect should be protected.⁹⁷⁷ The omission of relevant privacy protection can be interpreted as a legislative rejection to grant this aspect of the privacy value protection.⁹⁷⁸

Tipping J’s argumentation, in contrast, tackles the problem as to whether the courts are entitled to recognise or acknowledge rights, not enshrined in the NZBoRA, with the potential to limit enshrined freedoms. In this context, the argumentation of the US Supreme Court will be used for the good of the analysis. The recognition of the US ‘right to privacy’ was most relevantly based on ‘The Forgotten Ninth Amendment.’⁹⁷⁹ Likewise, New Zealand’s human rights instrument has an almost forgotten s 28,⁹⁸⁰ in which unenumerated rights are addressed.⁹⁸¹ Section 28 reads:

⁹⁷¹ See above Chapter Two, 1.1.

⁹⁷² *Hosking* [2005] 1 NZLR 1 (CA) para 224.

⁹⁷³ *Ibid.*

⁹⁷⁴ *Ibid.*, para 226.

⁹⁷⁵ *Griswold v Connecticut*, US 479, 486 (1965).

⁹⁷⁶ See above Chapter Two, 1.1.

⁹⁷⁷ See also M Richardson, ‘Privacy and Precedent: The Court of Appeal’s Decision in *Hosking v Runtling*’ (2005) 11 *New Zealand Business Law Quarterly* 82, 90; A Geddis, ‘*Hosking v Runtling*: A privacy tort for New Zealand’ (2005) 13 *Tort Law Review* 5, 10.

⁹⁷⁸ J F Burrows, ‘Invasion of Privacy - *Hosking* and Beyond’ [2006] *New Zealand Law Review* 389, 406; for the, in my opinion, correct view to the contrary see *Hosking* [2005] 1 NZLR 1 (CA) para 92 per Gault P and Blanchard J.

⁹⁷⁹ *Griswold v Connecticut*, US 479, 492 fn 6 (1965).

⁹⁸⁰ See the index of P and A Butler, *The New Zealand of Rights Act* (2005).

⁹⁸¹ This section was also invoked in *Brooker v Police* [2007] 3 NZLR 91 (SC) para 229 per Thomas J. See his Honour’s judgment for further details.

‘An *existing* right or freedom will not be held to be abrogated or restricted by reason only that the right or freedom is *not included* in this Bill of Rights or is *included only in parts*.’⁹⁸²

The use of the term ‘existing’ in s 28 may suggest that only such rights should not be abrogated which were already created or acknowledged by the time when the Bill of Rights was enacted. Section 28 is based on clause 22 of the Draft Bill. The corresponding comment of the White Paper⁹⁸³ explains, however, that the rights and freedoms granted by the proposed bill of rights were not intended to lay down an exhaustive list of the fundamental rights and freedoms of New Zealanders.⁹⁸⁴ The comment finally concludes that ‘there is of course nothing in the Bill of Rights that would prevent Parliament or the courts from creating or recognising new rights.’⁹⁸⁵ The Draft Bill proposed a minimum standard in several areas ‘leaving Parliament and the courts the opportunity as appropriate to give greater protection.’⁹⁸⁶ To my mind, it is clear that s 28 does not differentiate between the capabilities of Parliament on one hand and those of the courts on the other.⁹⁸⁷ Moreover, if the untouched sovereignty of Parliament would be left out of consideration, not even that institution would be able to create new rights to limit enumerated rights or freedoms in accordance with the NZBoRA. Rather, the number of rights capable of limiting, for instance, freedom of expression would have been frozen to the status quo of the day of the Bill’s enactment. This, I suggest, is an unsound interpretation of this section because it would make every response to social changes impossible without violating the NZBoRA.⁹⁸⁸

The proper interpretation of s 28 therefore indicates that the courts are entitled to acknowledge rights in order to limit enumerated rights of the NZBoRA. Furthermore, privacy interests were already ‘included [...] in parts’ in s 21 and with some imagination in ss 10 and 11. This did not prevent the courts from protecting a distinct aspect of

⁹⁸² Emphasis added.

⁹⁸³ The White Paper clarifies the purpose of s 28. Thus, I regard the following interpretation as being consistent with s 5 Interpretation Act 1999.

⁹⁸⁴ White Paper, para 10.179.

⁹⁸⁵ White Paper, para 10.179; *Brooker v Police* [2007] 3 NZLR 91 (SC) para 228 per Thomas J.

⁹⁸⁶ White Paper, para 3.6.

⁹⁸⁷ See also *Brooker v Police* [2007] 3 NZLR 91 (SC) para 214 per Thomas J.

⁹⁸⁸ Like a written Constitution, the NZBoRA can therefore be approached as a ‘living’ instrument – *ibid*, para 239.

privacy where they deem it appropriate.⁹⁸⁹ The courts are equally entitled to protect privacy to a greater extent, as long as Parliament has not clarified its intentions.⁹⁹⁰ In sum, the Court of Appeal in *Hosking* was entitled to acknowledge a new invasion of privacy tort protecting against public dissemination private facts as part of a ‘right to privacy.’⁹⁹¹ Some argue, however, that rights recognised under s 28 have not the same status as affirmed rights.⁹⁹² The ‘status’ of the right seems to be very important and this might indicate the need of an explicit statutory right to privacy. In any event, this was not saying that this aspect of privacy is *generally* a justified limit on the right of freedom of expression. It is a separate matter as to whether the protected interest places a justified limitation on that right pursuant to s 5 on the merits of the case. Before we may turn to this difficult issue, it needs to be addressed whether the Act has a ‘horizontal effect’ in a *Hosking* scenario.

1.1.3 A horizontal effect in purely private litigation?

It is fair to stress for the purposes of this thesis that the NZBoRA generally has an impact on the common law. The precise quality of this influence, however, is unclear.⁹⁹³ The applicability of the Act to a *Hosking* scenario requires that the court’s decision constitutes an ‘act done’ by the judicial branch of the government in terms of s 3(a).⁹⁹⁴ The section is the equivalent to s 6 HRA. The term ‘judicial branch’ denotes the Court of Appeal, High Court and the District Court.⁹⁹⁵ A meaningful interpretation of s 3(a), however, has apparently not been carried out so far; the reason is most likely the section’s complex scope.⁹⁹⁶ Elias J, as she then was, opined in *Lange v Atkinson*⁹⁹⁷ that the application of the Act to the common law follows from the language of s 3. On ap-

⁹⁸⁹ Tipping J made it clear that societal changes have arisen since 1990; the Judge believed that the time was right for the common law to respond - *Hosking* [2005] 1 NZLR 1 (CA) para 226; see also paras 92, 96 per Gault P and Blanchard J.

⁹⁹⁰ Ibid, para 228 per Tipping J; para 97 per Gault P and Blanchard J.

⁹⁹¹ See U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 248.

⁹⁹² Privacy: concepts and issues: review of the Law of Privacy part 1 (New Zealand Law Commission Study Paper; 19), para 4.89. (p 92).

⁹⁹³ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*’ [2004] *New Zealand Law Review* 681, 686; see also Rishworth et al, above n , at 102.

⁹⁹⁴ P A Joseph, *Constitutional and Administrative law in New Zealand* (3rd ed, 2007) para 27.4.2 at p 1153.

⁹⁹⁵ P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 98; the term would certainly embrace the Supreme Court as well, because there is no reason to read s 3(a) narrowly - see fn 163).

⁹⁹⁶ See P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 5.6.1.

⁹⁹⁷ [1997] 2 NZLR 22, 32 (HC).

peal, the Court of Appeal held that s 14, has ‘to be given effect by the Court in applying the common law’⁹⁹⁸ - referring again to the wording of s 3.⁹⁹⁹ The Court of Appeal did not accord the same importance to the NZBoRA as the High Court though.¹⁰⁰⁰ These observations nevertheless indicate that the common law has to be interpreted in view of the rights affirmed in the Bill of Rights.¹⁰⁰¹ By and large, a horizontal effect to some degree can be affirmed.¹⁰⁰²

This general observation is instructive for this analysis but not decisive. The English courts, for instance, had already implicitly accepted the applicability of art 10 ECHR to the common law without seriously discussing its horizontal nature.¹⁰⁰³ Likewise, the acknowledgement of the new invasion of privacy tort was arguably unexplored territory in New Zealand.¹⁰⁰⁴ Especially the *Lange* litigation still involved a public dimension, since the court’s task there was to determine how much freedom of expression a critic should enjoy when criticising the policy of an elected figure like the former Prime Minister.¹⁰⁰⁵ The defendant in this dispute between private litigants had alleged a ‘chilling effect’ on the discussion about the merits of this former political leader caused by the plaintiff’s legal proceedings.¹⁰⁰⁶ The involvement of Mr Lange therefore still provided a degree of verticality to the litigation.

⁹⁹⁸ *Lange v Atkinson* [1998] 3 NZLR 424, 431 (CA).

⁹⁹⁹ However, there exists a dispute concerning the appropriate interpretation of the term ‘act done’ of s 3. In Rishworth’s opinion, it is conceptually inappropriate to regard the judicial determination of a common law case as an ‘act done.’ The judiciary is therefore not acting as a branch of government - see Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 101.

¹⁰⁰⁰ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 13.17.12.

¹⁰⁰¹ J Norton, ‘Hosking v Runting and the Role of Freedom of Expression’ [2004] *Auckland University Law Review* 245, 253. Even if one would argue that the courts are not bound by the Act, they nevertheless would have to apply it - P Rishworth, ‘Review: Human Rights’ [2005] *New Zealand Law Review* 87, 89.

¹⁰⁰² *Duff v Communicado* [1996] 2 NZLR 89, 99 (HC) per Blanchard J (“Duff”). See also A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in Hosking v Runting’ [2004] *New Zealand Law Review* 681, 691.

¹⁰⁰³ J Norton, ‘Hosking v Runting and the Role of Freedom of Expression’ [2004] *Auckland University Law Review* 245, 251.

¹⁰⁰⁴ Compare also A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as applied in Hosking v Runting’ [2004] *New Zealand Law Review* 681, 686.

¹⁰⁰⁵ P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 106; A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in Hosking v Runting’ [2004] *New Zealand Law Review* 681, 691. Moreover, Mr Lange was still an active MP at that time - *Lange v Atkinson* [1998] 3 NZLR 424, 428 (CA).

¹⁰⁰⁶ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in Hosking v Runting’ [2004] *New Zealand Law Review* 681, 690.

Hosking, in contrast, is still a dispute between private litigants but each party lacked ‘the truly public standing held by Mr Lange.’¹⁰⁰⁷ A case involving the family of a ‘celebrity’ TV presenter, a freelance journalist and a newspaper publisher may have no vertical dimension at first sight. Quite the reverse, this could be seen as an archetype of a purely horizontal application of the act and was therefore, according to Geddis, a novelty for New Zealand. However, it will be argued later that the theoretical substructure of freedom of expression shows an additional vertical dimension even in this dispute.

Prior to *Hosking*, the New Zealand Court of Appeal had repeatedly stated, ‘that the NZBoRA would not apply to “wholly private conduct”, on the basis that the legislation “is a limitation on governmental, not private conduct”.’¹⁰⁰⁸ Without a public element transcending the interests of the parties, the Bill of Rights had not been held to apply up to that point.¹⁰⁰⁹ The opinion of the Court was delivered after the relevant part of the *Lange* litigation since a later appeal to the Privy Council followed by a rehearing by the Court of Appeal added little to the issue.¹⁰¹⁰ Moreover, Rishworth has been interpreted as saying that the common law has to be developed consistently with the Act only where *the state* is a *party*.¹⁰¹¹ Without an involvement of the state, there would consequently be no ‘act done’ by the judicial branch. After all, the court would not be bound under s 3(a) to give effect to the NZBoRA in the event of ‘wholly private litigation.’ Particularly the Court’s decision to acknowledge a new common law tort in *Hosking* would then represent an entirely orthodox common law paradigm.¹⁰¹² The courts might still take the implications of the Act into account - but because they want to, not because they have to.

¹⁰⁰⁷ Ibid, at p 697.

¹⁰⁰⁸ Ibid; *R v N (No 2)* (1999) 5 HRNZ 72 (CA) para 2 per Keith J (judgment for the Court). See also P A Joseph, *Constitutional and Administrative law in New Zealand* (3rd ed, 2007) para 27.4.2 at p 1145.

¹⁰⁰⁹ See P Rishworth et al, *The New Zealand Bill of Rights* (2003) 106.

¹⁰¹⁰ See Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*’ [2004] *New Zealand Law Review* 681, 689 fn 37.

¹⁰¹¹ J Norton, ‘*Hosking v Runting* and the Role of Freedom of Expression’ [2004] *Auckland University Law Review* 245, 252-3 referring to P Rishworth et al, *The New Zealand Bill of Rights* (2003) 98; see also S Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102 *Michigan Law Review* 387, 436.

¹⁰¹² See also J Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ (2003) 62(2) *Cambridge Law Journal* 444, 470 for the situation in England.

The point where the extension of the NZBoRA to ‘wholly private conduct’ had been accomplished was, according to Geddis, in *Hosking*. The Court of Appeal was at a crossroads between denying and affirming an influence of the NZBoRA on the new tort. Although none of the four separate judgments in *Hosking* answered this question, all Judges unanimously applied the Act to the case.¹⁰¹³ Only the three Judges in the majority indicated that there even might be a problem.¹⁰¹⁴ The joint judgment, for instance, seemingly ended up assuming a significant impact of the Act¹⁰¹⁵ and persuasive reasons do exist for this decision. Scholars have observed the differences between the NZBoRA and the Canadian Charter in this respect.¹⁰¹⁶ The Canadian courts ruled that the Charter does not influence private litigation unless the action is based on legislation, which in turn must be tested against the Charter.¹⁰¹⁷ Moreover, the Canadian Supreme Court held it would not even apply the Charter indirectly to ‘purely private’ matters.¹⁰¹⁸ The Canadian Charter, however, omits a reference to the judicial branch of the government as included in s 3(a) NZBORA.¹⁰¹⁹ Burrows points out, sensibly, that the Canadian approach would ‘fragment the law with different rules applying, depending on whether a public or a private actor was involved.’¹⁰²⁰ In this context, the non-application of the NZBoRA to ‘wholly private conduct’ would fragment the law depending on whether a TV presenter or a former Prime Minister is a party of the litigation. It should be borne in mind that the Court in *Hosking* acknowledged a common law rule accessible to every New Zealander. A differentiation between ‘wholly private conduct’ on one hand and the involvement of at least one private person of ‘true public standing’ (such as an ex-

¹⁰¹³ P Rishworth, ‘Review: Human Rights’ [2005] *New Zealand Law Review* 87, 89; A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*’ [2004] *New Zealand Law Review* 681, 696-7.

¹⁰¹⁴ Gault P, Blanchard J and Tipping J.

¹⁰¹⁵ K Evans, ‘Was Privacy the Winner of the Day’ [2004] *New Zealand Law Journal* 181, 182.

¹⁰¹⁶ Eg, M McDowall and D Webb, *The New Zealand legal system: Structure and Processes* (4th ed, 2006) 140.

¹⁰¹⁷ P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001), para 26.4.2 (5) (b) at p 1032. The Canadian Supreme Court held in *Hill v Church of Scientology Toronto* [1995] 2 SCR 1130, 1170 that ‘Charter rights do not exist in the absence of state action. The most that the private litigant can do is to complain that the common law is inconsistent with Charter values’; see also *RWDSU v Dolphin Delivery* [1986] 2 SCR 573, 603 per McIntyre J for further details of the indirect application of the Charter in the private sphere.

¹⁰¹⁸ J Norton, ‘*Hosking v Runtig* and the Role of Freedom of Expression’ [2004] *Auckland University Law Review* 245, 251 referring to *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130.

¹⁰¹⁹ Section 32(1). See also P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001), para 26.4.2 (5) (b) at p 1032.

¹⁰²⁰ J F Burrows, *Statute Law in New Zealand* (2nd ed, 1999) 419-20 as cited by P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 1032 referring to.

Prime Minister) would mean that the application of the tort would be subject to s 5 scrutiny only in the latter constellation. I would agree that this approach leads to an undesirable fragmentation of the law.¹⁰²¹ Furthermore, it should be noted that the Canadian Supreme Court has now apparently removed the distinction between public and private common law disputes.¹⁰²²

Norton brought forward a second, perhaps even more convincing reason for the application of the Act. She points out that freedom of expression incorporates both the societal interest in receiving the information as well as an individual's interest in imparting it.¹⁰²³ Contrary to Geddis' opinion, this statement suggests that no 'wholly private conduct' is involved at least when freedom of speech is at stake. Both parties themselves may lack the public standing of a former Prime Minister in a *Hosking* situation, but the societal interest in receiving the information may add an additional public component to the litigation.¹⁰²⁴ This additional component transcends the interests of the private parties involved. There is merit in believing that the doctrinal basis of freedom of expression requires the application of the Act as well.¹⁰²⁵ This writer would agree with such a conclusion. This would arguably also be in accordance with the situation in the USA. The extension of freedom of press protection from federal to state level by means of applying the 14th Amendment was for the benefit of all *people* rather than the *press*.¹⁰²⁶ Thus, the decision in *Hosking* would constitute an 'act done' by the judiciary in terms of s 3(a). The Court of Appeal was therefore right in its unanimous deci-

¹⁰²¹ See also J Norton, 'Hosking v Runtig and the Role of Freedom of Expression' [2004] *Auckland University Law Review* 245, 250 ('[t]he lack of coherent principle [...] is illustrated by the fact that a case with the same facts, but where one party is a state actor [...], the courts would be obliged to uphold freedom of expression').

¹⁰²² Ibid, at p 252 referring to *RWDSU Local v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 31 SCR 156.

¹⁰²³ Ibid, at p 255 referring to *Dagenais v Canadian Broadcasting Corporation* (1994) 120 DLR (4th) 12, 55-57; see also *Hosking* [2003] 3 NZLR 385 (HC) para 170 per Randerson J (HC); *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) para 90 per Blackburne J. –

¹⁰²⁴ See also P Rishworth, 'Review: Human Rights' [2005] *New Zealand Law Review* 87, 89.

¹⁰²⁵ See also P Rishworth et al, *The New Zealand Bill of Rights* (2003) 106.

¹⁰²⁶ K Ruckdaschel-Haley, 'The Florida Star v BIF: Balancing Freedom of the Press and the Right to Privacy upon Publication of a Rape Victim's Identity' (1990) 35 *South Dakota Law Review* 94, 98. In *Virgil v Time Inc.*, 527 F 2d 1122, 1128 (1975) the court argued that if the public has no 'right to know' (ie, something is not a matter of public concern) than the press no 'right to inform.' A potential right of the public to receive information incorporated in the First Amendment is nonetheless something the US courts still struggle with – see E B Easton, 'Public Importance: Balancing Proprietary Interests and the Right to Know' (2003) 21 *Cardozo Arts and Entertainment Law Journal* 139, 144 for further details.

sion to apply the NZBoRA to this legal dispute. To conclude, the privacy tort is consequently subject to s 5 scrutiny regardless of the status of the parties involved due to its potential to inhibit freedom of expression.

1.1.1.1 The appropriate degree of the NZBoRA's impact

The major difficulty in a *Hosking* situation is nonetheless the second aforementioned question tackling the problem to which extent the Court's decision had to consider the NZBoRA. As we recollect from the examination of the English law, the two arguable approaches distinguish between a strong indirect and a weak indirect horizontal application of a human rights instrument. On the one hand, a strong indirect application of the Act would place an *absolute duty* the courts to decide the legal dispute between purely private litigants consistent with the NZBoRA.¹⁰²⁷ A weak effect, on the other hand, would merely *inform* the courts about a legal outcome consistent with the Act.¹⁰²⁸ The main difference between the two standards is that the application of the former would persuade the courts to treat a common law case between two private litigants in the same manner as if a branch of the government would be involved. According to the latter approach, the NZBoRA might still exert influence on the court's decision; it nonetheless implies the possibility of deciding a particular case inconsistently with the NZBoRA.¹⁰²⁹ Particularly the judgment of Elias J in *Lange* left open the question as to whether the horizontal effect of the NZBoRA was direct or indirect.¹⁰³⁰

During the discussion of the English law, we have seen that one could confuse particularly the 'strong indirect impact' with a 'direct horizontal effect' of the Act.¹⁰³¹

¹⁰²⁷ See G Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726, 730; S Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387, 436; A L Young, 'Remedial and Substantive Horizontality: The Common Law and Douglas v Hello! Ltd' [2002] *Public Law* 232, 235.

¹⁰²⁸ P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 100-01 differentiates whether 'the judicial branch, being explicitly bound by s 3(a), is obliged to develop the common law so as to ensure it is consistent with the Bill of Rights' or whether the common law has to be 'appropriately developed in the light of the rights affirmed by the legislature in the Bill of Rights'; see also S Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387, 436.

¹⁰²⁹ A Geddis, 'The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*' [2004] *New Zealand Law Review* 681, 692.

¹⁰²⁹ Ibid.

¹⁰³⁰ I Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) *International and Comparative Law Quarterly* 57, 70.

¹⁰³¹ See above Chapter Three, 2.

A direct effect would enable a private litigant to claim for an unwarranted interference, for instance, with her freedom of speech directly under s 14.¹⁰³² This effect may in turn require the courts to manufacture a new cause of action available in litigation between private parties.¹⁰³³ Keith J nonetheless advocated such an application of the Act in *Hosking*. This was part of his ‘lack of established need’-argument against the acknowledgement of a separate tort of privacy.¹⁰³⁴ His Honour listed the existing protections of privacy interests including the traditional breach of confidence doctrine and advocated that an obligation of confidence would be an integral part of the action.¹⁰³⁵ Nevertheless, the Judge implicitly recognised that some privacy interests outside the statutory context are deserving of protection.¹⁰³⁶ His Honour continued indicating that a plaintiff, being in a life threatening *Venables*¹⁰³⁷ situation, might rely directly on her right to life if she is unable to claim an obligation of confidence.¹⁰³⁸

I beg to differ with his Honour’s assertion.¹⁰³⁹ According to s 3(a), the Act applies, regardless of the fact that it has not been entrenched as supreme law,¹⁰⁴⁰ to ‘acts done’ by the three ‘branches of the government of New Zealand.’ The provisions of the Act, thus, place no duties on private persons, unless they perform a public function (s 3 (b)). The corresponding s 6 (3)(b) HRA in English law has been interpreted similarly.¹⁰⁴¹ However, private litigants may turn enshrined rights and freedoms *against the courts*, because *they* are part of the judicial branch of the government and therefore subject to s 3(a). The courts may then in turn apply the Act in an indirect fashion whilst de-

¹⁰³² A L Young, ‘Remedial and Substantive Horizontality: The Common Law and *Douglas v Hello! Ltd*’ [2002] *Public Law* 232, 235.

¹⁰³³ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*’ [2004] *New Zealand Law Review* 681, 692; see also S Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102 *Michigan Law Review* 387, 411.

¹⁰³⁴ *Hosking* [2005] 1 NZLR 1 (CA) para 177 per Keith J.

¹⁰³⁵ *Ibid*, paras 185-200.

¹⁰³⁶ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 250.

¹⁰³⁷ *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908.

¹⁰³⁸ *Hosking* [2005] 1 NZLR 1 (CA) para 201 per Keith J.

¹⁰³⁹ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*’ [2004] *New Zealand Law Review* 681, 692 fn 50 would presumably not share this view. He mentions, apparently with approval, H W R Wade, ‘Horizons of Horizontality’ (2000) 116 *Law Quarterly Review* 217 and later embraces the direct applicability of the Act into his own model - at p 693).

¹⁰⁴⁰ Compare U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 250 fn 122.

¹⁰⁴¹ Lord Steyn, ‘2000 - 2005: Laying the Foundations of Human Rights Law in the United Kingdom’ [2005] *European Human Rights Law Review* 349, 353.

ciding the common law case between these private litigants.¹⁰⁴² Thus, the response to s 3(a) may be a strong indirect or a weak indirect application of the NZBoRA. Keith J's direct application of the Act, however, is not sustainable in the author's view. If it proves otherwise, the result would be a revolutionary extension of the NZBoRA into the private sphere.¹⁰⁴³ In sum, it is apt to observe that this proposal does not represent a convincing way to fill gaps of the law occurring in *Venables* situations.¹⁰⁴⁴

Nevertheless, the Court of Appeal first dealt with the appropriate impact of the Act on the common law in a citizen-to-citizen scenario. Even though this was uncharted territory, none of the Judges supplied an explanation regarding this point. However, they gave implicit indications about their positions. Gault P and Blanchard J explicitly refused to tackle 'the complex question of the extent to which the courts are to give effect to the rights and freedoms'¹⁰⁴⁵ affirmed in the NZBoRA; their Honours nonetheless believed that their decision had to be consistent with the Act.¹⁰⁴⁶ As an unqualified consistency with the Act seemed to be common ground since the *Lange* litigation, this statement is too unspecific. Their Honours therefore intentionally left open whether their judgment was *required* by following an absolute duty or was merely *informed* by the NZBoRA. However, their approach implicitly marks a very indirect impact of the Act. Geddis observes that, in their Honours' approach, s 5 merely 'operates as a framework within which to determine the best - or most appropriate for New Zealand - equilibrium between freedom of speech (of some importance due to its affirmation in the NZBoRA) and other contemporary values (which may or may not be accorded recogni-

¹⁰⁴² Again, A Geddis opines that the NZBoRA might even operate 'as a sword where there is a failure of the common law to provide a remedy to a plaintiff whose rights have been infringed upon by another private party' - 'The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*' [2004] *New Zealand Law Review* 681, 702.

¹⁰⁴³ A Geddis, 'The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*' [2004] *New Zealand Law Review* 681, 703. In Germany, for instance, a direct application of human rights has also been considered, but was finally dismissed. The major reason was that a direct application would have 'drastic effects on private autonomy' - K M Lewin, 'The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany' (1968) 17(3) *International Comparative Law Quarterly* 571, 597.

¹⁰⁴⁴ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 250.

¹⁰⁴⁵ *Hosking* [2005] 1 NZLR 1 (CA) para 114.

¹⁰⁴⁶ *Ibid*, para 111.

tion in the NZBoRA).’¹⁰⁴⁷ In theory,¹⁰⁴⁸ this weak indirect effect of the Act enabled both judges to depart from the information given by the NZBoRA.

Tipping J was the third judge in favour of the new tort’s acknowledgement. His Honour opined, ‘it will often be appropriate for the values which are recognised in [the NZBoRA] context to inform the common law in its function of regulating relationships between citizen and citizen.’¹⁰⁴⁹ In his Honour’s view, the NZBoRA informs the common law in a *Hosking* scenario, which theoretically again leaves open the possibility of deciding a case inconsistently with the Act. According to Geddis, s 5 as interpreted by Tipping J, ‘explicitly becomes the site for a “value balancing” exercise: “Freedom of expression must accommodate other values which society regards as important”.’¹⁰⁵⁰ The judicial branch of the government must ‘give appropriate weight to the rights affirmed in the Bill of Rights’ in the event of developing the common law.¹⁰⁵¹ The Judge summarised his position by stating, ‘the Courts must do their best to strike the right balance between the competing values.’¹⁰⁵² Although his Honour’s approach still represents an indirect application, these statements tend towards a stronger indirect impact of the NZBoRA.

The NZBoRA was applied much more directly in the dissenting judgments of Anderson and Keith JJ.¹⁰⁵³ Keith J enumerated the several existing provisions protecting privacy and concluded that the legislative pattern did not exclude a judge-made privacy tort; the statutory context nonetheless told strongly against its existence.¹⁰⁵⁴ The provisional conclusion became final for his Honour due to a comparatively direct application of s 5. Such an application meant that the new tort did not place a ‘necessary’

¹⁰⁴⁷ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*’ [2004] *New Zealand Law Review* 681, 700.

¹⁰⁴⁸ As it will be argued below, the theoretical possibility of deciding inconsistently does not bring about practical consequences.

¹⁰⁴⁹ *Hosking* [2005] 1 NZLR 1 (CA) para 229 (emphasis added).

¹⁰⁵⁰ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*’ [2004] *New Zealand Law Review* 681, 700-01 citing *Hosking* [2005] 1 NZLR 1 (CA) para 230.

¹⁰⁵¹ *Hosking* [2005] 1 NZLR 1 (CA) para 229.

¹⁰⁵² *Ibid*, para 230 (emphasis added).

¹⁰⁵³ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*’ [2004] *New Zealand Law Review* 681, 702.

¹⁰⁵⁴ *Hosking* [2005] 1 NZLR 1 (CA) para 207.

limit on freedom of speech.¹⁰⁵⁵ Anderson J made a comment to the effect that a direct application of the Act would exclude freedom of speech, as an enshrined right, from being treated equally with privacy, which merely had the status of a value.¹⁰⁵⁶ Furthermore, the Judge did not regard privacy as a necessary limit demonstrably justified in a democratic society in terms of s 5.¹⁰⁵⁷ Both judgments reflect the view that freedom of speech ought to take almost automatic precedence over the privacy value.¹⁰⁵⁸ The more direct application of the Act leads, according to the Judges of the minority, to a denial of the new privacy tort's existence.

The judgments of the minority in *Hosking* are nonetheless difficult to analyse in this particular context. Their Honours' position on the appropriate impact of Act is intermingled with their respective interpretation of s 5. The judges seem to imply that privacy is *generally* an unnecessary limit on freedom of speech. A limit has to be 'reasonable/necessary' on an abstract basis (regardless of the facts of the case) rather than 'reasonable/necessary' subject to a balancing exercise (on the facts of a particular case).¹⁰⁵⁹ This issue will therefore receive further attention during the discussion of s 5.

Furthermore, Anderson J's opinion¹⁰⁶⁰ that a *right* (freedom of expression) cannot be limited by a manifestation of a *value* (informational privacy) touches upon the doctrinal problem concerned with the relationship between an enshrined 'right' and 'limit.' In other words, are only the enshrined rights fundamental or can limits, such as privacy, be fundamental too? This matter will receive further attention below during the discussion of the balancing exercise championed by Tipping J. However, the very notion of s 14 operating as a *right* within the common law implies a direct application of the NZBoRA.

¹⁰⁵⁵ Ibid, paras 208 and 220.

¹⁰⁵⁶ Ibid, paras 265-266.

¹⁰⁵⁷ *Hosking* [2005] 1 NZLR 1 (CA) paras 268, 270.

¹⁰⁵⁸ A Geddis, 'The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*' [2004] *New Zealand Law Review* 681, 706.

¹⁰⁵⁹ Paul Rishworth seems to share their Honours' position - 'Review: Human Rights' [2005] *New Zealand Law Review* 87, 103 ('[...] in *Hosking v Runtig* it was necessary to decide whether a common law tort of invading privacy infringed s 14 of the Bill of Rights' – emphasis supplied).

¹⁰⁶⁰ *Hosking* [2005] 1 NZLR 1 (CA) para 265.

After all, these judgments are confusing when trying to find an answer with regard to the adequate impact of the NZBoRA on the new tort. Moreover, all separate opinions were given without any further explanation concerning the reasons leading to the respective decisions. Geddis consequently argues that *Hosking* was merely the beginning of the debate on this issue.¹⁰⁶¹ He proposes that the courts should in practice ‘array along a continuum between these two points [direct and indirect application of the Act] rather than closely conform to one of two alternative templates.’¹⁰⁶² However, Geddis indicates that flexibility is desirable in the event of *other influences* on the decision coming into play - influences apart from those exerted by the Act.¹⁰⁶³

Therefore, the decisive question is whether there are opposite influences. This is particularly questionable because the Act is applied to the acknowledgement of a new tort and not to long existing common law. A differentiation between a strong or weak indirect effect, in my view, would only be sensible if this would lead to differing practical results. Examples provided by Geddis for such ‘other influences’ on the court’s decision are (1) precedential authority; and (2) judicial consistency.

Firstly, the existence of precedential authority could cause uncertainty if the courts had applied a ‘particular [common law] rule over a period of time’ and suddenly change the rule because of the impact of human rights.¹⁰⁶⁴ Precedential authority, however, could be ruled out straight away. The Court of Appeal acknowledged a new common law rule in *Hosking* and the decision represents the first authority in this area of the law. I suggest that this category is only relevant if long existing common law is tested against the horizontally applied NZBoRA. Precedential authority, then, might serve as an argument against an alteration of existing common law in the light of the human rights instrument.¹⁰⁶⁵

¹⁰⁶¹ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*’ [2004] *New Zealand Law Review* 681, 682.

¹⁰⁶² *Ibid.*, at p 693.

¹⁰⁶³ *Ibid.*, at p 692-3.

¹⁰⁶⁴ *Ibid.*

¹⁰⁶⁵ See P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 107.

Secondly, Geddis names ‘the silence of the common law in a particular area’ as a reason for an inconsistent decision. If Parliament had refused to legislate in a particular area of the law and the courts have refused to grant relief so far, judges may continue to refrain from becoming involved even if this would lead to an infringement of an affirmed right.¹⁰⁶⁶ The situation in *Hosking* was different though. The courts had already intervened in *Tucker v News Media Ownership Ltd*¹⁰⁶⁷ even before the NZBoRA had been enacted. Although Parliament has refused to legislate, the courts have not refused to grant relief. There was no silence of the law in terms of Geddis’ second category. Quite the reverse, the courts approved the existence of a tort,¹⁰⁶⁸ which was (and still is) directly aiming at s 14 with the potential to limit this freedom. Moreover, freedom of expression is the only enshrined right or freedom relevant in this context. This freedom would have been protected - not violated - by the silence of the common law.

With regard to Geddis’ argumentation, there is no reason for a judge, who is assuming that she was merely *informed* by the NZBoRA (rather than having an *absolute duty*, to render her decision compatible with the Act) to depart from the information given by the Act. In this particular situation, it makes, in the author's view, no difference if the NZBoRA places an absolute duty on the court or merely informs its decision. The remark of Tipping J that, ‘it will often be appropriate for the values which are recognised in [the NZBoRA] context to inform the common law in its function of regulating relationships between citizen and citizen’ is evasive and therefore unsatisfying. It was more important to decide what was appropriate in the specific situation, ie in *Hosking*.¹⁰⁶⁹ His Honour apparently refers to the argument that consistency of the common law with the NZBoRA does not simply involve a reflection of Bill of Rights duties in the private sphere.¹⁰⁷⁰

¹⁰⁶⁶ A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*’ [2004] *New Zealand Law Review* 681, 693 (emphasis added).

¹⁰⁶⁷ [1986] 2 NZLR 716

¹⁰⁶⁸ The tort was first considered as forming part of the common law in *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 - U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 246, 250 (‘New Zealand had a tort for 10 years prior to this judgment[...]’).

¹⁰⁶⁹ See also A Geddis ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*’ [2004] *New Zealand Law Review* 681, 698 (‘Again, the question [...] when it is not appropriate for the NZBoRA to “inform the common law”, received no further attention’).

¹⁰⁷⁰ See P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 107.

Notwithstanding, even judges favouring a weak indirect impact of the Act, such as Gault P and Blanchard J, had to consider what other sources of information might alter their decision when a *new* common law tort is about to be acknowledged. The absence of alternative sources, which might have the potential to alter the result found through a weak indirect application of the Act, would otherwise lead to the same result as if the decision was the response to a strong indirect effect. With regard to the acknowledgement of the invasion of privacy tort, it seems fit to summarise the impact of the NZBoRA on the common law as follows: the impact may differ depending on

- whether the courts apply the Act to an already *existing* common law remedy, with the consequence that the impact may array along a continuum between weak and strong indirect effect (depending on other influences on the decision); or
- whether the common law is enriched¹⁰⁷¹ by the acknowledgement of a *new* remedy (with the consequence that there is no practical difference between a strong or weak indirect application of the Act due to a lack of other influences on the decision).

1.1.1.2 Conclusion

The application of the NZBoRA on the new invasion of privacy tort is afflicted with problems. The first point to be made is that it is not entirely evident why the Act had to be applied to the common law in *Hosking*. The important underlying issue - left aside here - is whether the private law should be constitutionalised in the first place. However, the five Judges accepted an impact and convincing reasons are indeed with this decision. The focus of attention rests on the question whether the privacy tort involves ‘wholly private conduct’ in a *Hosking* scenario. This could be answered in the negative, *inter alia*, if the societal interest in receiving private information, as one function of freedom of expression, would be recognised as an element being beyond purely private conduct. On the other hand, assuming that this conduct would be identified as

¹⁰⁷¹ This term has been chosen deliberately in order to evade a discussion regarding the actual role of common law judges as interpreters, discoverers or makers of the law.

‘wholly private,’ the courts have to reconsider whether the NZBoRA has any effect on the privacy tort at all.

The second question as to which degree the Act should be determinative for relevant aspects of the new common law tort remained unanswered in the aftermath of *Hosking*. The Judges offered three alternatives ranging from the most indirect to a direct application. The differentiation between those approaches is not only a matter of academic importance, as one might argue. This is displayed in the conclusions attained by Keith and Anderson JJ. Both Judges in the minority turned the implication of a direct impact of the Act into a major argument against the very existence of the privacy tort.

Gault P, Blanchard and Tipping JJ can be interpreted as saying that a strong indirect effect of the NZBoRA is inappropriate for New Zealand. The joint judgment implies a very weak indirect impact instead whilst Tipping J seems to propagate an intermediary position on the issue.¹⁰⁷² The author nonetheless took the liberty, not to decide the matter. Given that an application of the Act does not avert the invasion of privacy tort *a priori*, both of the remaining opportunities would accomplish the same result. Thus, a further differentiation would indeed become a purely academic exercise. The acknowledgement of a new common law rule is in this respect distinct from the mere application of the NZBoRA on long existing common law. Since no other persuasive influences on the decision are identifiable, it would theoretically make no difference if the indirect influence of the Act were strong or weak.¹⁰⁷³ In theory, the joint judgment must therefore accomplish the same result as Tipping J when applying the Act to the new tort. However, it will be shown below that this is not the case.

It has to be stressed, however, that the author’s conclusion strongly depends on the alternative sources to alter a court’s decision suggested by Geddis. Geddis’ argumentation builds upon the basic assumption that judges considering common law ‘do so within the paradigm of common law reasoning, and in the light of *all* principles and

¹⁰⁷² His position tends apparently towards an ‘as strong as possible’ influence of the Act.

¹⁰⁷³ This is not to say, however, that there are not other influences determining the interpretation of the NZBoRA itself. English law, US law and the ICCPR, for instance, may all persuade the courts in different ways while interpreting the rights and limits contained in the NZBoRA. In my view, this is a different matter though.

values that they find persuasive.’¹⁰⁷⁴ The author, as a novice to the common law, is unaware how far this statement might reach. Potential ‘alternative principles and values’ deriving from the common law regime in a *Hosking* situation might, hence, be a field deserving further dedication in a context other than this thesis.

The author, for his part, finally concludes that New Zealand has joined the international trend of constitutionalising the private or common law at the latest with the Court of Appeal’s decision in *Hosking*. Once this decision has been made, NZBoRA concerns have to be reflected decisively in the shape of the tort.¹⁰⁷⁵ The question what ‘constitutionalisation’ actually means in the context of New Zealand’s law follows naturally and will be addressed next.

1.1.4 Justified limits of freedom of expression

Anderson J, as already indicated, refused to acknowledge a freestanding invasion of privacy tort in *Hosking*. His Honour saw a grave difference between freedom of expression as an affirmed right and privacy, which he categorised as a value.¹⁰⁷⁶ Furthermore, the Judge pointed out that the acknowledgement of the new common law rule involved the issue of ‘whether [freedom of speech] is to be limited by a particular manifestation of a value.’¹⁰⁷⁷ These statements touch upon the problem of whether the newly protected privacy aspect encroaches upon freedom of speech legitimately. This is also a relevant issue for practical purposes, because the shaping of the public concern feature of the tort is influenced by the outcome of the following observation. Whatever form the tort will finally take, the formulation of the public interest concept is crucial to determine whether the publication of private facts may occur.¹⁰⁷⁸

The White Paper is quite unambiguous regarding the limitation process of freedom of speech. The commentary to clause 7 of the Draft Bill refers to its clause 3,

¹⁰⁷⁴ See P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 107 (emphasis added).

¹⁰⁷⁵ See U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 250 (‘Tipping J agreed with the joint judgment, but his judgment focussed to a much greater degree on the New Zealand Bill of Rights Act[...]').

¹⁰⁷⁶ See *Hosking* [2005] 1 NZLR 1 (CA) para 265.

¹⁰⁷⁷ Ibid, para 266.

¹⁰⁷⁸ U J Cheer, ‘Privacy and the Public Interest’ (2005) 1 *Privacy Law Bulletin* 145.

which later became essentially untouched s 5.¹⁰⁷⁹ Section 5 reads as follows: ‘Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’

The court’s first task is to find out whether freedom of expression had been infringed,¹⁰⁸⁰ which circumscribes the necessity to determine the right’s scope. Furthermore, the White Paper comment to clause 3 clarifies that the rights contained in the Bill were not supposed to be absolute; it would have been misleading to suggest otherwise.¹⁰⁸¹ In cases of an interference with the scope of a right, the courts have to figure out whether the limit is (1) ‘reasonable’ and ‘demonstrably justified in a free and democratic society;’ and (2) ‘prescribed by law.’¹⁰⁸² The practical application of this provision by the courts is unfortunately not as clear-cut, which was again reflected in *Hosking*.

1.1.4.1 Reasonable limit demonstrably justified in a free and democratic society

Little has been said by the courts about the interpretation of the ‘reasonable’ limit ‘demonstrably justified in a free and democratic society.’¹⁰⁸³ The reason might be found in the problematic interplay between ss 4, 5 and 6.¹⁰⁸⁴ It seems settled, though, that s 5 is relevant in the context of developing the common law.¹⁰⁸⁵ The terms may ‘involve public policy analysis and a value judgment on the part of the Court’ whether or not a limitation is demonstrably justified.¹⁰⁸⁶ The drafters of the White Paper Bill expected a confrontation of the courts ‘with a difficult task trenching in some cases on

¹⁰⁷⁹ The White Paper commentary is instructive for our purposes – *Hansen v R* [2007] 3 NZLR 1 (SC) para 187 per McGrath J.

¹⁰⁸⁰ White Paper, para 10.58.

¹⁰⁸¹ White Paper, paras 10.24 and 10.26; see also P and A Butler, *The New Zealand of Rights Act* (2005) para 6.5.1; *Ministry of Transport v Noort*; *Police v Curren* [1992] 3 NZLR 260, 277 (CA) per Richardson J.

¹⁰⁸² White Paper, para 10.26. Note that the ‘prescribed by law’ element is not discussed in this analysis.

¹⁰⁸³ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.10.1

¹⁰⁸⁴ See P Rishworth, ‘Lord Cooke and the Bill of Rights’ in P Rishworth (ed), *The Struggle for simplicity in the law* (1997) 309-12. See also *Hansen v R* [2007] 3 NZLR 1 (SC) para 6 per Elias CJ; paras 88 - 92 per Tipping J.

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ *Ministry of Transport v Noort*; *Police v Curren* [1992] 3 NZLR 260, 283 (CA) per Richardson J.

matters of policy.’¹⁰⁸⁷ The question has been raised as to whether clause 3, which later became s 5, conferred tasks on the courts, which should remain with Parliament.¹⁰⁸⁸ The New Zealand courts therefore might be obliged to deliver a judgment on behalf of society.¹⁰⁸⁹ Since the Courts have to serve society, they arguably have to take all relevant factors of the particular case into account during this process. These relevant factors may include, for instance, legal, social, moral and economic factors.¹⁰⁹⁰ It seems settled that the interpretation of s 5 is a complex task arguably requiring extensive context-specific consideration of various NZBoRA provisions and their relationship with s 5.¹⁰⁹¹ The New Zealand courts, however, have not fostered a clear position. Against this background, Petra and Andrew Butler concluded that the New Zealand courts have barely scratched the surface of the complexity of s 5.¹⁰⁹²

In order to determine the reasonableness of a limit, the first task is to identify the values underlying the rights we recognise.¹⁰⁹³ With reference to the importance of freedom of speech, the drafters of the White Paper Bill referred, for example, to relevant cases decided by the ECtHR. Particularly the *Sunday Times v United Kingdom*¹⁰⁹⁴ case was regarded as a valuable source.¹⁰⁹⁵ The ECtHR held that any limit on freedom of expression could only be regarded as ‘necessary in a democratic society’ if there was a pressing social need in the restriction.¹⁰⁹⁶

The New Zealand Courts, however, have later argued that a reasonable limit in terms of s 5 does not have to correspond with a pressing social need.¹⁰⁹⁷ The wording of

¹⁰⁸⁷ White Paper, para 10.30.

¹⁰⁸⁸ *Ministry of Transport v Noort; Police v Curren* [1992] 3 NZLR 260, 283 (CA) Richardson J.

¹⁰⁸⁹ *Moonen v Film & Literature Board of Reviews (No 1)* [2000] 2 NZLR 9 (CA) para 18 per Tipping J; *Hosking* [2005] 1 NZLR 1 (CA) para 236 per Tipping J.

¹⁰⁹⁰ *Ibid*; *Ministry of Transport v Noort; Police v Curren* [1992] 3 NZLR 260, 283 (CA) Richardson J. Note that the Court of Appeal made it clear that this approach was not prescriptive; it was just one possible interpretation among other possibilities - *Moonen (No 2)* [2002] 2 NZLR 754 (CA) para 15.

¹⁰⁹¹ *Moonen v Film & Literature Board of Reviews (No 2)* [2002] 2 NZLR 754 (CA) para 13.

¹⁰⁹² P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.12.1.

¹⁰⁹³ *Ibid*, para 6.9.3.

¹⁰⁹⁴ *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (“Sunday Times”).

¹⁰⁹⁵ White Paper, para 10.31.

¹⁰⁹⁶ *Ibid*.

¹⁰⁹⁷ *R v Jeffries* [1994] 1 NZLR 290, 303 (CA); *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48, 62 (HC) per Eichelbaum CJ and Greig J.

the European Convention and the NZBoRA may be similar,¹⁰⁹⁸ but decisive for New Zealand is whether ‘reasonable’ needs to be equated with ‘necessary.’ The approach chosen on this matter can have a substantive effect on one’s approach to limitations.¹⁰⁹⁹ The courts found that both terms do not circumscribe the same standard. Equating the term ‘reasonable’ with ‘necessary’ would mean to apply a higher standard than the following term ‘demonstrably justified in a free and democratic society’ indicates.¹¹⁰⁰

This observation is in agreement with the ECtHR, which held in *Sunday Times* that ‘necessary’ does not contain the flexibility of expressions such as particularly ‘reasonable.’¹¹⁰¹ The ECtHR held that the UK law of contempt with its inherent interest in a fair administration did not outweigh the public interest in freedom of speech. In other words, the interest in a fair administration was not sufficiently pressing to abridge the right to freedom of expression in the light of the particular facts of the case.¹¹⁰² In my view, the distinction between both terms is correct, especially when ‘reasonable’ is read together with the term ‘demonstrably justified.’ The wording suggests a lower standard compared to the less flexible ‘necessary’ standard.¹¹⁰³ As a result, it might be easier to limit freedom of expression in New Zealand in comparison to Europe.¹¹⁰⁴

The differentiation between both terms does not catch the full complexity of s 5 however. The decision in *Hosking* featured two distinct ways to determine the reasonableness¹¹⁰⁵ of a limit: (1) an approach asking whether a limit *generally* has to be ‘reasonable’ regardless of the facts of a particular case; and (2) an approach determining whether the limit has to be regarded on a more *context-specific* basis as ‘reasonable’ in

¹⁰⁹⁸ Blanchard J described them as ‘broadly comparable’ in *Duff* [1996] 2 NZLR 89, 100 (HC).

¹⁰⁹⁹ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) para 6.10.6.

¹¹⁰⁰ *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48, 62 (HC) per Eichelbaum CJ and Greig J.

¹¹⁰¹ *Sunday Times* (1979) 2 EHRR 245 para 59. In Germany, for instance, the Federal Constitutional Court has held that ‘in a democracy the legislature is entitled to pursue *any purpose*, provided it is not excluded by the constitution. The importance of the purpose is not a condition for legislative action’ - D Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383, 388.

¹¹⁰² See White Paper, para 10.31.

¹¹⁰³ *TVNZ Ltd v Quinn* [1996] 3 NZLR 24, 58 (CA) per McGechan J

¹¹⁰⁴ The ECtHR has apparently watered down the term ‘necessary’ anyway by interpreting it with a strong ‘reasonableness’ tone, it does not appear to be reasonable to even start off with a higher standard that is not even reflected in the wording - P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) 140 fn 134.

¹¹⁰⁵ The judges of the minority still seemed to use the term synonymously with ‘necessary.’

the light of a case's facts through a weighing exercise. A similar dispute, as we know, arose in the context of the respective US law in *Hall v Post*.¹¹⁰⁶

Keith J preferred the former interpretation. His Honour did not recognise the new tort partly because the 'statutory context tells strongly against the existence of such a tort.'¹¹⁰⁷ Furthermore, and more importantly in this context, he saw this conclusion confirmed by his analysis of s 5. Keith J pointed out that the new privacy tort, as proposed by the joint judgment, closely adapted the formulation of the US Restatement of Torts.¹¹⁰⁸ His Honour consequently paid special attention to the situation in the USA,¹¹⁰⁹ where the tort has 'failed to become a usable and effective means of redress for plaintiffs.'¹¹¹⁰ As a result, the acknowledgement of the tort in New Zealand was, in his Honour's opinion, both unnecessary and of little use.¹¹¹¹ The learned Judge argued that the experience of the USA jurisdictions 'demonstrates a *lack of pressing need* (the basic point being made in this part of these reasons) - a need which, especially in terms of s 5 of the Bill of Rights has to be demonstrably justified by the proponents [...].'¹¹¹² Particularly this observation has been described as a concerning aspect of the majority judgment.¹¹¹³

In my view, Keith J's suggestions are not conclusive for three reasons. Firstly, the White Paper suggests that the courts may consider whether the law in other countries, such as the United Kingdom, the United States, Canada, Australia or (the former) Western Europe, do protect the limit in question.¹¹¹⁴ Nevertheless, whilst the comparative material may often be suggestive, the final decision has to be made regarding the

¹¹⁰⁶ See above Chapter Two, 2.6.1.

¹¹⁰⁷ *Hosking* [2005] 1 NZLR 1 (CA) para 207.

¹¹⁰⁸ *Ibid*, para 210.

¹¹⁰⁹ *Ibid*, paras 211, 212.

¹¹¹⁰ *Ibid*, para 216 quoting D L Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis' (1983) 68 *Cornell Law Review* 291, 362-3.

¹¹¹¹ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 250.

¹¹¹² *Hosking* [2005] 1 NZLR 1 (CA) para 220.

¹¹¹³ J Norton, 'Hosking v Runting and the Role of Freedom of Expression' [2004] *Auckland University Law Review* 245, 247.

¹¹¹⁴ White Paper, para 10.34.

situation in New Zealand.¹¹¹⁵ Keith J's interpretation of the 'reasonableness' element, however, is limited to a conclusion drawn from foreign legal systems.

I have already suggested during the discussion of the US tort that the comparative material quoted by Keith J is not suggestive.¹¹¹⁶ This is because it seems inappropriate to draw a direct conclusion from the ineffectiveness of the tort in practice to a lack of pressing need for a workable privacy tort in that country's society. The comparison of legal systems demands taking the institutional context of the law into account. To my eyes, the small number of successful plaintiffs¹¹¹⁷ in the USA does not indicate a lack of societal need; such a conclusion rather seems to involve a confusion of cause and effect. The, admittedly, drastic example *BJF v Florida Star*¹¹¹⁸ should be recollected at this point.¹¹¹⁹ The plaintiff in that case did not succeed in preventing a newspaper from revealing her identity as a rape victim. The defeat represents the 'effect' but it does not reflect a lack of pressing need as the corresponding 'cause.' Rather, the corresponding cause is a lacking ability of the US law to differentiate between the public interest in the media coverage of a capital crime itself and the genuinely questionable interest in divulging the identity of the victim involved. I suggest that the unrivalled might of the First Amendment, thus, has the potential to overshadow an existing societal need. This was, for instance, the case in *BJF v Florida Star*. The State of Florida protected the identity of rape victims through a separate Act.¹¹²⁰ It seems reasonable to suggest that this enactment - as well as any other enactment - was a response to a societal need to keep information of this particular kind private. In other words, the dissemination of a rape victim's identity was a socially recognised violation of privacy.¹¹²¹ The vehicle to enforce similar identity suppression under common law, however, is the pub-

¹¹¹⁵ Ibid.

¹¹¹⁶ See above Chapter Two, 3.

¹¹¹⁷ Ibid, para 216 ('fewer than 18').

¹¹¹⁸ 491 US 524 (1989).

¹¹¹⁹ See above Chapter Two, 1.2.4.

¹¹²⁰ Florida Statute § 794.03 (1987) provided: 'Unlawful to publish or broadcast information identifying sexual offense victim. No person will print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section will constitute a misdemeanor of the second degree, punishable as provided in § 775.083, or § 775.084' – as cited in *Florida Star v BJF*, 491 US 524, 526 fn 1 (1989).

¹¹²¹ See D J Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 483.

lic disclosure tort.¹¹²² The tort could thus be regarded as part of the response to this societal need. In short, the meaningfulness of drawing conclusions from the situation in the USA for the needs of New Zealand's society is at best conditional.

Secondly, Keith J has employed an inappropriate standard in the first place. As we recollect, a limit placed upon an affirmed right has to be 'reasonable' as distinct from 'necessary.' The limit, therefore, does not have to respond to a pressing societal need.¹¹²³ His Honour's attempt to apply a stricter standard by requiring a 'pressing need' in the process of the acknowledgement of the new privacy tort is flawed. It is, of course, the same standard of reasonableness in this context as on any other occasion when an affirmed right or freedom of the NZBoRA is about to be limited.

Thirdly, there is reason to argue that both judges of the minority stuck too closely to wording of s 5. The White Paper already indicates greater latitude in this respect. It includes a comment to the effect that the interpretation of s 5 requires more than just a careful reading of the precise words.¹¹²⁴ According to the White Paper, the courts would rather end up in a *weighing exercise*. The aforementioned process would involve an assessment of (1) the importance of the right infringed, (2) the nature of infringement, and (3) the importance of the interest put forward to justify the limit.¹¹²⁵ For the purposes of this analysis, it is thus fair to say that the prerequisites 'reasonable limit' and 'demonstrably justified in a free and democratic society' are read together and require some kind of balancing exercise.¹¹²⁶ Richardson J assumed soon after the enactment of the NZBoRA that the bridging inquiry under s 5 was a matter of weighing

¹¹²² The lawsuit in *Florida Star* was based on negligent violation of Fla Stat § 794.03. The judgment has, however, a direct impact on the public disclosure tort – see K W Bacon, 'Florida Star v BJE: The Right of Privacy Collides with the First Amendment' (1990) 76 *Iowa Law Review* 139, 147 (1990).

¹¹²³ His Honour applied the stricter standard due to the influence of Art 19(3) IPCCR – *Hosking* [2005] 1 NZLR 1 (CA) paras 179-180. Keith J opined already in *Lange v Atkinson* 3 NZLR 424, 466 (CA) that ICCPR limitation clauses have an effect on s 5.

¹¹²⁴ White Paper, para 10.31.

¹¹²⁵ *Ibid.*

¹¹²⁶ *Duff* [1996] 2 NZLR 89, 100 (HC) per Blanchard J; P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 176. See also *Hansen v R* [2007] 3 NZLR 1 (SC) para 103 per Tipping J.

and accordingly proposed steps to this effect in *Noort*.¹¹²⁷ Blanchard J refined these steps later in *Duff* as requiring the courts to examine:¹¹²⁸

- (1) the significance *in the particular case* of the values underlying the Bill of Rights Act;
- (2) the importance in the public interest of the intrusion on the particular rights protected by the Bill of Rights Act;
- (3) the limits sought to be placed on the application of the Act provision *in the particular case*;
and
- (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

The author fails to identify differences, significant enough for the purposes of this thesis, to the proportionality test envisaged in the White Paper.¹¹²⁹ Keith J's approach in *Hosking* is, therefore, too narrow since he merely stuck to the wording of s 5. His Honour tried to figure out whether the privacy *tort* is justified in an abstract way rather than entering into a weighing exercise. This result is contrary to the findings of the New Zealand courts; whether a limit is justified therefore has to be determined on the merits of the case.¹¹³⁰

At last, this result plainly leads us to the question of what would represent the appropriate balancing exercise in terms of s 5. Having suggested that the Act informs the privacy tort, this information becomes persuasive when the preferable balancing technique has to be determined. The technique, used to limit rights and freedoms, influences the common law in order to determine whether privacy prevails over freedom of speech in a particular case or vice versa. It could be a proportionality test as envisaged in the White Paper and performed in the UK after the enactment of the HRA, a defini-

¹¹²⁷ *Ministry of Transport v Noort; Police v Curren* [1992] 3 NZLR 260, 283-4 (CA) per Richardson J.

¹¹²⁸ *Duff* [1996] 2 NZLR 89, 101 (HC) per Blanchard J (emphasis supplied).

¹¹²⁹ The ECtHR has interpreted the corresponding 'necessary in a democratic society' requisite as requiring the application of a proportionality test – see M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574, 579; M Hertig Randall, 'Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?' (2006) 6 *Human Rights Law Review* 53, 56. See also *Peck v UK* (2003) 13 BHRC 669 para 76; *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) para 67 per Blackburne J.

¹¹³⁰ Compare also the opinion of the ECHR in *Sunday Times* (1979) 2 EHRR 245 para 65: '[t]he Court has to be satisfied that the interference was necessary having regard to facts and the circumstances prevailing in the specific case before it.'

tional balancing test, as performed in the common law of the USA, or an original solution. The respective interpretation of each human rights instrument, as we have seen, has a decisive impact on the balancing exercise in the UK and the USA. It would be difficult to understand why it should be otherwise in New Zealand after the Judges in *Hosking* deliberately decided to apply the NZBoRA to the common law.

Unfortunately, the New Zealand courts have not found a definite answer to the question. Rather, preferences ‘are scattered throughout the law reports, although the issue has rarely been subject of considered analysis.’¹¹³¹ This is disadvantageous for the present purposes since it is unclear how the new privacy tort would be constitutionalised. A minimum illumination of this point is unavoidable in order to analyse the limitation processes proposed by the majority in *Hosking*. It seems settled that any formulation of the limitation process is crucial whatever form the tort may take.¹¹³² The methods applied by the courts include (1) definitional balancing; (2) *ad hoc* balancing; and (3) an approach combining both aforementioned techniques. Each approach and the respective compatibility with s 5 will receive further attention in the following paragraphs.

Definitional balancing

Definitional balancing ‘involves reading limitations into the definition’ of freedom of expression.¹¹³³ As a result, freedom of expression might therefore not embrace, for instance, the distribution of child pornography.¹¹³⁴ It appears useful to choose a drastic example¹¹³⁵ because it would be a natural reaction to decide this way. The enshrined right is inherently limited in cases that the distribution of child pornography is

¹¹³¹ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.6.2.

¹¹³² U J Cheer, ‘Privacy and the Public Interest’ (2005) 1 *Privacy Law Bulletin* 145. See also G Philipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 212-3.

¹¹³³ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.6.1; P A Joseph, *Constitutional and Administrative law in New Zealand* (3rd ed, 2007) para 27.4.4 at p 1160 and N M Richards, ‘Reconciling Data Privacy and the First Amendment’ (2005) 52 *University of California Los Angeles Law Review* 1149, 1172, 1177.

¹¹³⁴ *Ibid.*

¹¹³⁵ See, eg, *Ashcroft v The Free Speech Coalition*, 535 US 234, 245-6 (‘The freedom of speech has its limits, it does not embrace certain categories of speech, [...] obscenity, and pornography with real children’).

¹¹³⁵ Taken from *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754 (CA).

not regarded as an exercise of freedom of expression.¹¹³⁶ This is the mode of balancing performed in US law, for the most part, because the wording of the First Amendment does not contain explicit limits.¹¹³⁷ Moreover, the US Constitution does not include a separate limitation clause.¹¹³⁸ This structure of fundamental rights, as I have sought to show, has led to a strong opinion regarding the First Amendment as granting absolute rights or at least as absolute as possible. However, US Courts have found that child pornography is not by definition without value. Where the ‘speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.’¹¹³⁹ The protected status of the speech in question is determined by a (permissible) community mores test similar to the newsworthiness element in the privacy context.¹¹⁴⁰ In this regard, the US Supreme Court has held as follows:¹¹⁴¹

the basic guidelines for the trier of fact must be: whether "the *average person, applying contemporary community standards*" would find that the work, taken as a whole, *appeals to the prurient interest*, [...] (b) whether the work depicts or describes, *in a patently offensive way*, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Once the scope of a constitutional right is infringed the courts follow an ‘intermediate conception of rights;’ the rights do not operate as trumps (in Dworkin’s sense), but have more force than they would have if they were operating as principles in the light of a proportionality test.¹¹⁴² As regards freedom speech, a content-based restriction requires the strictest review in the USA. Only an interference ‘necessary to serve a compelling state interest and [...] narrowly drawn to achieve that end’ suffices.¹¹⁴³ In

¹¹³⁶ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.6.1.

¹¹³⁷ Note that pornography is, of course, protected by the First Amendment – see J Rubinfeld, ‘The First Amendment’s Purpose’ (2001) 53 *Stanford Law Review* 767, 824.

¹¹³⁸ See also White Paper, para 10.25.

¹¹³⁹ *Ashcroft v The Free Speech Coalition*, 535 US 234, 251 (2002).

¹¹⁴⁰ It should come as no surprise that the use of community mores tests is equally disputed in this context – see, eg, F Schauer, ‘Freedom of expression adjudication in Europe and the United States: a case study in comparative constitutional architecture’ in G Nolte (ed), *European and US Constitutionalism* (CUP 2005) 49, 68.

¹¹⁴¹ *Miller v California*, 413 US 15, 24 (1973) (emphasis added). See also *New York v Ferber*, 458 US 747, 764-5 (1982); *Ashcroft v The Free Speech Coalition*, 535 US 234, 240.

¹¹⁴² M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 593; R M Dworkin, *Taking Rights Seriously* (Duckworth, 1978) 200.

¹¹⁴³ Eg, *Perry Education Association v Perry Local Educators’ Association*, 460 US 37, 45 (1983).

brief, the US approach consists of categorisation at the first stage and limited balancing at the second.¹¹⁴⁴ This, as we know, is the main reason why the public disclosure branch of the common law tort is defunct for practical purposes.¹¹⁴⁵ The chief advantage/disadvantage of this system is that the determination of the scope of the respective right goes along with its limitations.¹¹⁴⁶ Therefore, the technique is appropriate for generating general rules ‘which can be employed in future cases without the occasion for further weighing of interests.’¹¹⁴⁷ As already indicated, this approach is ‘episodic’ rather than ‘systematic’ and thus akin to common law methodology.¹¹⁴⁸ Thus, it is capable of producing useful precedential authority.

In New Zealand, a similar approach was taken in *Solicitor-General v Radio NZ*¹¹⁴⁹ where the court held that a contempt of court is not covered by freedom of speech.¹¹⁵⁰ The Court arrived at this result after balancing the abstract doctrine of contempt of court against freedom of speech.¹¹⁵¹ According to this judgment, s 14 is limited inherently by recognising a generally prevailing value of a fair administration.¹¹⁵² As a rule, there would be no need for further weighing in the future. The scope of freedom of expression did not embrace a contempt of court regardless of the facts of the particular case. A justification under s 5, however, only takes place if the ambit of s 14 would be wide enough to embrace a contempt of court.¹¹⁵³ Since this was already not the case, there was no need for the Court to figure out whether the contempt of court

¹¹⁴⁴ See F Schauer, ‘Freedom of expression adjudication in Europe and the United States: a case study in comparative constitutional architecture’ in G Nolte (ed), *European and US Constitutionalism* (CUP 2005) 49, 64.

¹¹⁴⁵ See above Chapter Two, 1.4.

¹¹⁴⁶ This technique therefore seeks to avoid a conflict between countervailing rights and interests – see S Mize, ‘Resolving Cases of Conflicting Rights under the New Zealand Bill of Rights Act’ (2006) 22 *New Zealand Universities Law Review* 50, 63.

¹¹⁴⁷ T A Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 943, 979; see also S Mize, ‘Resolving Cases of Conflicting Rights under the New Zealand Bill of Rights Act’ (2006) 22 *New Zealand Universities Law Review* 50, 63-4.

¹¹⁴⁸ See also F Schauer, ‘Freedom of expression adjudication in Europe and the United States: a case study in comparative constitutional architecture’ in G Nolte (ed), *European and US Constitutionalism* (CUP 2005) 49, 59 fn 23.

¹¹⁴⁹ [1994] 1 NZLR 48, 59-60 (HC) per Eichelbaum CJ and Greig J (“Radio New Zealand”).

¹¹⁵⁰ See also the reference in *Duff* [1996] 2 NZLR 89, 100 (HC) per Blanchard J (“Duff”).

¹¹⁵¹ *Radio New Zealand* [1994] 1 NZLR 48, 60 (HC) per Eichelbaum CJ and Greig J.

¹¹⁵² *Ibid.*

¹¹⁵³ *Ibid.*, at p 58.

was a restriction within the limits of s 5. The limitation process, therefore, may be composed of two steps, but reaching the second step is not mandatory.

However, this approach on limiting fundamental rights is, in the author's view, incompatible with the NZBoRA. This country's human rights instrument has a general limitation clause in s 5. One can therefore draw an elementary distinction between the law of the USA and New Zealand. An isolated view on s 5, as part of the 'General Provisions' in Part I of the NZBoRA, suggests a limitation process necessarily consisting of two steps:¹¹⁵⁴ (1) scope and purpose of the civil and political rights of the NZBoRA have to be delineated properly; and (2) consideration has to be given to the reasonableness of limits placed upon these rights on the merits of the case. In other words, the determination of a right's scope (Part II of the Act), has to be divided from the determination as to whether it is justified to place a limit on that particular right.¹¹⁵⁵

A proper reading of the White Paper supports this view. Inspired by the Canadian Charter, the drafters envisaged an intermediate model between the US approach and the one taken in Europe or by the ICCPR.¹¹⁵⁶ The basic limiting procedure in this country is nevertheless significantly different from the approach taken in the USA whilst it is not substantively different from the concept employed in the UK.¹¹⁵⁷ The main reason for this intermediary position was the simplicity of language.¹¹⁵⁸ The drafters assumed that the greater elaboration of detail, as manifested in the ECHR, was supposed to have little impact on the final judgments.¹¹⁵⁹ The practical outcome was expected to be similar, if not identical, in substance. Article 10 (1) ECHR, for instance, defines the scope of freedom of expression. Article 10 (2) ECHR, on the other hand, contains pre-conditions (elaborated in detail for the purposes of freedom of expres-

¹¹⁵⁴ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.4.4 and 6.4.1 referring to the similar approach taken in the White Paper, paras 10.27-10.29.

¹¹⁵⁵ See also P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.6.4.

¹¹⁵⁶ White Paper, paras 10.25 and 10.26.

¹¹⁵⁷ See also F Schauer, 'Freedom of expression adjudication in Europe and the United States: a case study in comparative constitutional architecture' in G Nolte (ed), *European and US Constitutionalism* (CUP 2005) 49, 53-4.

¹¹⁵⁸ White Paper, para 10.26.

¹¹⁵⁹ Ibid.

sion)¹¹⁶⁰ under which a limitation of the right described in art 10 (1) ECHR might be justified. This approach therefore requires a two-step limitation process. Determination of the right's scope is carried out on one level whilst the justification of a limit takes place on a second level. The second step has to be strictly distinguished from the first. The difference between the approaches taken in the UK and New Zealand is, thus, that the UK approach includes 'in each provision stating a freedom a separate statement of limits.'¹¹⁶¹ However, s 5 is the *equivalent* of the NZBoRA to art 10 (2) ECHR in the shape of a general limitation clause (written 'in short, simple, elegant and inspiring language')¹¹⁶² as distinct from several separate statements of limits on each right or freedom.¹¹⁶³ The specific limitation clause in the context of English law is typical of post-World War II human rights instruments; the approach taken in Canada and New Zealand is a characteristic of modern codifications.¹¹⁶⁴

Definitional balancing, however, is done inherently in s 14 and, on occasion, even excludes 'the need to proceed to s 5' of the NZBoRA in order to justify the limit.¹¹⁶⁵ This happened in *Radio New Zealand*. This approach largely waters down the substantial difference in limiting fundamental rights between the USA and New Zealand. A large part of the justification – if not the whole procedure – already takes place in the first step of the limitation process. It simultaneously waters down the similarities between the HRA/ECHR, on the one hand, and the NZBoRA, on the other. Notwithstanding, the decisive point to be kept in mind is that the approach taken in *Radio New Zealand* does not necessarily lead to a second step following a definition of the scope of s 14 through definitional balancing.

Ad hoc balancing

As already indicated during the preceding exposition, an *ad hoc* balancing exercise requires the broad definition of the rights and freedoms without any influence of

¹¹⁶⁰ Ibid.

¹¹⁶¹ White Paper, para 10.25.

¹¹⁶² Ibid, para 10.26.

¹¹⁶³ See also *Hansen v R* [2007] 3 NZLR 1 (SC) para 187 per McGrath J.

¹¹⁶⁴ See M Kumm, 'What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement' at p 5-6 <<http://www.lsr.nelco.org/nyu/plltwp/papers/46> at 08 February 2008>.

¹¹⁶⁵ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), paras 6.6.1, 6.6.7.

competing values or other considerations.¹¹⁶⁶ In a separate second step, a court has to determine whether the limit on freedom of expression is reasonable.¹¹⁶⁷ At this stage, competing values and/or other considerations come into play. In *Moonen (No 1)*¹¹⁶⁸, the Court of Appeal championed such an approach, which enables the courts to use both s 14 and s 5 consistently. The Court described the ambit of freedom of expression as being ‘as wide as human thought and imagination.’¹¹⁶⁹ The broad definition of the ambit ascertains only the range of expressive acts or utterances falling within the scope of the right. Hence, it is very rare in the UK that art 10 (1) ECHR is not engaged when freedom of speech is argued.¹¹⁷⁰ According to this approach, freedom of expression would embrace, by way of illustration, the distribution of child pornography, hate speech, etc. This interim result might be bewildering to some; it suggests that the law protects even such abominable conducts. Being confronted with such an example, it is a natural temptation to limit the right inherently.¹¹⁷¹ Rishworth summarised this natural first reaction by mentioning that ‘the right [freedom of speech] is defined so broadly [...] it includes much that does not deserve protection.’¹¹⁷² However, this example merely shows the importance of making a clear distinction between the determination of the scope of a right, on one hand, and the justification of limits placed on the right, on the other.¹¹⁷³

In the following second step, the court therefore examines whether the limiting principle, together with other influencing factors (such as policy) justifies a restriction on the expressive act in that particular case.¹¹⁷⁴ In the UK, this process is carried out by applying a proportionality balancing exercise. Ursula Cheer has argued that in ‘contrast to the New Zealand approach, both Law Lords [Baroness Hale and Lord Hope in

¹¹⁶⁶ Ibid, para 6.6.1; *Hansen v R* [2007] 3 NZLR 1 (SC) para 22 per Elias CJ.

¹¹⁶⁷ See also A Barak, ‘Proportional Effect: The Israeli Experience’ (2007) 57 *University of Toronto Law Journal* 369; M Kumm, ‘What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement’ at p 5 <<http://www.lsr.nelco.org/nyu/plltwp/papers/46> at 08 February 2008>.

¹¹⁶⁸ [2000] 2 NZLR 9 (CA) para 15 per Tipping J.

¹¹⁶⁹ *Moonen (No 1)* [2000] 2 NZLR 9 (CA) para 15 per Tipping J.

¹¹⁷⁰ A Merris, ‘Can We Speak Freely Now? Freedom of Expression under the Human Rights Act’ [2002] *European Human Rights Law Review* 750, 751.

¹¹⁷¹ See U J Cheer, ‘Censorship and the Bill of Rights’ [2000] *New Zealand Law Journal* 145, 146.

¹¹⁷² P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 312.

¹¹⁷³ See also *Hansen v R* [2007] 3 NZLR 1 (SC) para 22 per Elias CJ.

¹¹⁷⁴ See M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 582 who notes that an infringement of a right merely ‘triggers an assessment of whether the infringement is justified’).

Campbell] were prepared to distinguish between different types of speech, identifying political and artistic or educational speech as more deserving of protection than commercial speech.’¹¹⁷⁵ The original statement by Baroness Hale¹¹⁷⁶ might be misleading since all types of speech are equally embraced and protected by the broad scope of art 10 (1) ECHR in the first place. This equal treatment has to be distinguished from the fact that the aforementioned types of speech may receive different treatment under art 10 (2) ECHR.¹¹⁷⁷ While determining the reasonableness of the limit, the court is expected ‘to have regard to the importance of the particular type of expression.’¹¹⁷⁸ By applying a proportionality test, different kinds of speech may carry different kinds of weight;¹¹⁷⁹ different weight in the balance follows from divergent importance to a democratic society at justification stage.¹¹⁸⁰ Political speech, for instance, is more difficult to outweigh in comparison to commercial speech.¹¹⁸¹ However, political speech is not ‘deserving’ of more protection in a strict sense; it is simply carrying more weight in the balance and is therefore less likely to be outweighed by a competing limit in a proportionality test.¹¹⁸² This is because of its own utmost importance to a democratic society, not a weight accorded to this type of speech by the British judges. It is nevertheless important to reconsider Herbert Hart’s concept of ‘open-textured law.’ These categories of speech are not fixed. It is arguably impossible ‘to draw a bright definitional line be-

¹¹⁷⁵ U J Cheer, ‘Privacy and the Public Interest’ (2005) 1 *Privacy Law Bulletin* 145, 149 (emphasis added).

¹¹⁷⁶ *Campbell* [2004] 2 All ER 995 (HL) para 148.

¹¹⁷⁷ Eg, *CC v AB* [2007] EMLR 11 (QBD) para 36 per Eady J. For a brief discussion of the difference between ‘commercial speech’ and political speech see M Hertig Randall, ‘Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?’ (2006) 6 *Human Rights Law Review* 53 particularly pp 79-86.

¹¹⁷⁸ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.6.1 (emphasis added); see also White Paper, para 10.58 ([...] the courts will be concerned to weigh the value of the particular speech (moving from political and social speech, to commercial speech, to pornography and to other forms of expression through conduct, [...])).

¹¹⁷⁹ This model, as we know, cannot be transposed into the legal system of the USA without problems. It is incompatible with the ‘neutrality principle’ which means that the government must maintain neutrality as to different conceptions of good; all speech has principally the same value – see D J Solove, ‘The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure’ (2003) 53 *Duke Law Journal* 967, 984-5.

¹¹⁸⁰ See also for the discussion in the USA: P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 172; D J Solove, ‘The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure’ (2003) 53 *Duke Law Journal* 967, 1010.

¹¹⁸¹ See *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) para 96 per Blackburne J.

¹¹⁸² See *Green Corns Ltd v Claverley Group Ltd* [2005] EMLR 31 (QB) para 97 per Tugendhat J; M Hertig Randall, ‘Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?’ (2006) 6 *Human Rights Law Review* 53, 58.

tween facts falling within and those falling outside a certain category [of speech],’ which should, according to Maya Hertig Randall, not distract from the usefulness of categorisation.¹¹⁸³

Given that disseminated private information in the context of the new privacy tort consists of ‘child pornography,’ the individual privacy interest of the child would usually prevail over free-speech interests in Europe without much ado. In other words, the dissemination of child pornography is embraced by freedom of speech but outweighed because of its immeasurable low value to a democratic society. In the USA, in contrast, pornography and political speech are both subject to the same ‘strict scrutiny.’¹¹⁸⁴ At this point, it nevertheless seems reasonable to reiterate that it is most important to distinguish between content-based and content-neutral restrictions on freedom of speech.¹¹⁸⁵ In *Young v American Mini Theatres Inc*¹¹⁸⁶, for instance, the US Supreme Court declined to apply the strict scrutiny normally required for content-based regulations. The Court adopted instead the lower standard of scrutiny usually applied to content-neutral regulations, because the case at hand was arguably concerned with zoning regulations to single out adult-oriented businesses (such as adult theatres).¹¹⁸⁷ However, only content-based restrictions of freedom of speech are of interest in this context.¹¹⁸⁸

¹¹⁸³ M Hertig Randall, ‘Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?’ (2006) 6 *Human Rights Law Review* 53, 57.

¹¹⁸⁴ J Rubinfeld, ‘The First Amendment’s Purpose’ (2001) 53 *Stanford Law Review* 767, 824. See also *Ashcroft v The Free Speech Coalition*, 535 US 234, 263 (2002) per O’Connor J (concurring in part and dissenting in part).

¹¹⁸⁵ See above Chapter Two, 1.2.

¹¹⁸⁶ 427 US 50 (1976)

¹¹⁸⁷ See *ibid*, at p 71-3. The regulation at issue in that case required that an adult-oriented business could not be located within 1000 feet of any two other ‘regulated uses’ or within 500 feet of any area zoned for residential use. The term ‘regulated use’ applied to ten types of establishments in addition to adult theatres – *ibid*.

¹¹⁸⁸ It should be noted that the majority argued, ‘society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate [...]’ – *ibid*, at p 70. In his scathing dissent, Justice Stewart castigated this as a ‘drastic departure from established principles of First Amendment law;’ the Judge also noted that the ‘Court rides roughshod over cardinal principles of First Amendment’ – at p 85. The Judge concluded by mentioning that ‘the Court invokes a concept wholly alien to the First Amendment’ – at p 86.

With regard to the approach set out in the the UK, Tipping J described the varying values of different speech types to society in a strikingly similar way in *Hosking*¹¹⁸⁹, as it will be argued later. In brief, this approach is compatible with the NZBoRA. Moreover, this model requires a systematic approach as opposed to the episodic review applied in the USA.

The Duff approach

A third way of interpreting s 5 was elaborated in *Duff*. Blanchard J disagreed with the decision in *Radio New Zealand* but argued that some inherent limits must be read into s 14.¹¹⁹⁰ Nonetheless, his Honour stated that the term expression ‘should be defined widely, and that questions on limits of the right should generally be determined through s 5.’¹¹⁹¹ In the course of examining the relationship between the law of contempt and the NZBoRA, the Judge found three ways to approach the relationship of freedom of speech with the law of contempt.¹¹⁹² Blanchard J described both a definitional as well as an *ad hoc* balancing test as outlined before. He concluded that a third way was preferable, which should embrace both aforementioned methods.¹¹⁹³ The definitional balancing part was supposed to treat the matter on an abstract level while the *ad hoc* balancing part should reflect the reality by taking the facts of every case into account.¹¹⁹⁴ Even though some inherent limits could be read into s 14, the courts necessarily have to consider furthermore whether the restriction of freedom of speech is justified with regard to the provisions to s 5. Being necessarily composed of two steps, this limitation process seems compatible at least with s 5.¹¹⁹⁵ At the same time, the necessary second limitation step is the main distinction in comparison to the approach proposed in *Radio New Zealand*.

¹¹⁸⁹ [2005] 1 NZLR 1 (CA) paras 233-235.

¹¹⁹⁰ *Duff* [1996] 2 NZLR 89, 99 (HC).

¹¹⁹¹ *Ibid*.

¹¹⁹² Note that the impact of the NZBoRA on the law of contempt is an ‘example of “judicial procedural horizontality”, not full common law horizontality’ of the Act, see A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*’ [2004] *New Zealand Law Review* 681, 698 fn 75.

¹¹⁹³ *Duff* [1996] 2 NZLR 89, 99 (HC)

¹¹⁹⁴ *Ibid*, at p 99-100.

¹¹⁹⁵ It will be discussed later whether the process is also compatible with s 14.

The last two concepts can be found in the separate judgments of the Court of Appeal's majority in *Hosking*. Tipping J's approach, as we will see, is very similar to the one taken in the UK because it is based on proportionality and therefore on an *ad hoc* balancing test as proposed in *Moonen (No 1)*. The joint judgment, by contrast, defines particularly freedom of speech through definitional balancing followed by an additional proportionality test. This approach was supposed to be guided by the approach elaborated in *Duff*.¹¹⁹⁶ Both approaches of the majority will now be addressed in further detail.

1.1.4.2 *Balancing according to the joint judgment*

Counsel for the Hoskings had submitted, 'the type of speech that the respondents are seeking to impart in this case should receive a lesser protection under the [New Zealand] Bill of Rights [Act] than political or artistic speech, because of its commercially motivated gossip nature.'¹¹⁹⁷ This submission apparently attempts to define the scope of s 14 inherently through a definitional balancing exercise as counsel solely relied on US authorities.¹¹⁹⁸

The joint judgment, however, refused to adopt categories such as 'commercial' and 'non-commercial' speech.¹¹⁹⁹ Instead, their Honours referred at first sight with approval to a proportionality test, 'which catches the interrelationship between the competing values.'¹²⁰⁰ Even though this seemingly led to an *ad hoc* balancing exercise as employed in the UK,¹²⁰¹ their approach ended up as an accumulation of three different kinds of balancing. As I attempt to show in the following, the joint judgment employed (1) abstract definitional balancing to limit freedom of speech to 'matters of public con-

¹¹⁹⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 111.

¹¹⁹⁷ Ibid, para 131 per Gault P and Blanchard J. Similar to hate speech, commercial speech was once regarded as not being protected by the First Amendment at all. Once it had deemed a protected form of speech though, this category faces the already familiar challenges of the 'market place of ideas' - D L Zimmerman, 'Who put the Right into the Right of Publicity' (1998) 9 *DePaul University Journal of Art and Entertainment Law* 35, 60. It consequently still 'receive[s] high levels of constitutional protection under the increasingly robust First Amendment standards protecting such speech' - see R A Smolla, 'Privacy and the First Amendment Right to Gather News' (1999) 67 *George Washington Law Review* 1097, 1115 fn 71.

¹¹⁹⁸ Ibid, citing the older cases *Ohralik v Ohio State Bar Association*, 436 US 447 (1978); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, 425 US 748 (1976).

¹¹⁹⁹ Ibid para 135; see also U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 255.

¹²⁰⁰ Ibid, para 132.

¹²⁰¹ Ibid. Their Honours referred to the work of the British scholar Gavin Phillipson.

cern' for the purposes of the tort; (2) *ad hoc* definitional balancing to determine whether or not an issue is a 'matter of public concern' and (3) a proportionality test to catch the interrelationship between the competing values.

The three balancing exercises

In order to understand the first part consisting of definitional balancing, one needs to have a basic idea about the structure of the tort championed by both Judges and its inherent definitions of privacy and freedom of expression. According to this approach, an invasion of privacy is actionable if the plaintiff shows

- facts in respect of which there is a reasonable expectation of privacy; and
- that the violation of this expectation could be regarded as highly offensive to a reasonable person of ordinary sensibilities.¹²⁰²

Freedom of expression, on the other hand, protects the defendant only if the publication of the highly offensive facts corresponds with a 'public concern' as distinct from a public interest or curiosity.¹²⁰³ Their Honours apparently found themselves obliged to confine freedom of speech tightly after having adopted the US highly offensive test. The Judges used the term public concern deliberately in order to stress the difference to matters of general interest or curiosity to the public.¹²⁰⁴ What the public might be interested in, is not the same as the public interest.¹²⁰⁵ Their Honours indicated that matters of general interest or curiosity would not suffice to outweigh the sub-

¹²⁰² See *Hosking* [2005] 1 NZLR 1 (CA) para 117; see too *Rogers v TVNZ Ltd* [2007] NZSC 91 para 98 per McGrath J.

¹²⁰³ *Ibid*, para 133; see also *Rogers v TVNZ Ltd* (2005) 22 CRNZ 668 (HC) para 22 per Venning and Winkelmann JJ.

¹²⁰⁴ *Ibid*, 134; see also *Andrews v TVNZ* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 81. In the modern Californian cases, by contrast, 'legitimate public interest' and 'legitimate public concern' are identical to 'newsworthiness' - G L Bostwick, 'The Newsworthiness Element: *Shulman v Group W Prods., Inc. Muddies the Waters*' (1999) 19 *Loyola of Los Angeles Entertainment Law Review* 225, 237.

¹²⁰⁵ *McKennitt* [2007] 3 WLR 194 (CA) para 66 per Buxton LJ; U J Cheer, 'Privacy and the Public Interest' (2005) 1 *Privacy Law Bulletin* 145, 146. What the public is interested in may be described as "human interest" - see R A Smolla, 'Privacy and the First Amendment Right to Gather News' (1999) 67 *George Washington Law Review* 1097, 1098.

stantial harm done by a ‘highly offensive’ invasion of privacy.¹²⁰⁶ Although the judges rejected a categorisation of speech into ‘commercial’ and ‘non-commercial’ speech, they still used definitional balancing in order to define the scope of s 14. The only difference is that the judges adopted ‘matters of public concern’ and ‘matters of mere public interest or curiosity’ as general categories.¹²⁰⁷ The scope of s 14 is, nonetheless, inherently limited without reference to the facts of the case – the classic feature of definitional balancing. Charitably understood, this part of the balancing exercise is nevertheless consonant with the *Duff* concept. Blanchard J opined in that case that some limits could be read into the scope of s 14 by using this abstract technique.¹²⁰⁸

In the author’s view, this part of the limitation process is, nonetheless, not conspicuous for its dedication to the NZBoRA. It has been argued before that the Act has a decisive influence on the tort once the courts have deliberately decided to extend its impact to private litigants. The joint judgment, in contrast, confined the scope of s 14 apparently solely under the influence of the ‘highly offensive’ test. This is not information which the Judges received from the NZBoRA. Instead, it seems as if their Honours were taken hostage by their own delineation of the privacy interest before they moulded the public interest/concern feature of the tort.

Furthermore, the joint judgment adopted the US standard, as proposed in the Restatement, as a balancing method in order to determine ‘matters of public concern.’¹²⁰⁹ Their Honours opined that community norms, values and standards should be taken into account in each individual case.¹²¹⁰ This freestanding balancing technique might be labelled as ‘*ad hoc* definitional balancing.’ The scope of freedom of speech is limited inherently, but on the facts of the case rather than on an abstract basis. However,

¹²⁰⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 134; see also *Andrews v TVNZ* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 81.

¹²⁰⁷ See also U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 255.

¹²⁰⁸ However, the limits inherent in s 14 obviously related to the Full High Courts finding in *Radio New Zealand* [1994] 1 NZLR 48, 59-60 that, for instance, acts of violence or murder are not ‘expression’ in terms of s 14.

¹²⁰⁹ *Hosking* [2005] 1 NZLR 1 (CA) para 135.

¹²¹⁰ *Ibid.*

there is no direct confrontation between countervailing interests in free speech and privacy involved - hence the name *ad hoc* definitional balancing.¹²¹¹

The preferences of New Zealand's judges may be scattered through the law reports, but, as far as the author is aware, *ad hoc* definitional balancing has heretofore never been used or even pronounced as an element in order to define and limit ss 14. The technique neither appears in *Radio New Zealand* nor in *Duff* and certainly not in *Moonen (No1)*. Its adoption was rather a novelty in this country. As a result, the common law might hence be 'constitutionalised', but not because of the impact of this country's quasi-constitutional framework. Lest we forget the words of Lord Steyn: 'in law, context is everything.'¹²¹² Privacy enthusiasts in the USA, as we know, seek to establish this common law balancing exercise as First Amendment doctrine in the aftermath of *Bartnicki v Vopper*.¹²¹³ It might be a way to revitalise an otherwise 'swallowed' private facts tort in that country. Getting to the core of the matter, it is a question of establishing its constitutional integrity in the USA.

In my opinion, comparative law must always be a means of interpreting the domestic law, not an end.¹²¹⁴ US judges may be obliged to use techniques of this kind because the constitutional framework does not allow different forms of balancing. However, there is no reason to believe that this is automatically a valid technique to interpret ss 14 and 5. Transposing the author's understanding of comparative law into this analysis, the first question must always be whether such a technique is compatible with 'our' rule of law (macro comparison).¹²¹⁵ Granted that this question could be answered in the affirmative, it would be worthwhile analysing whether the adoption of foreign law might be advantageous as compared to the law as it stands (micro comparison). Alas, their Honours' reasoning as to why this technique fits into the legal framework of this

¹²¹¹ See also *Brooker v Police* [2007] 3 NZLR 91 (SC) para 134 per McGrath J, who seems to paraphrase a similar balancing technique.

¹²¹² *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622 para 28.

¹²¹³ Eg, P J McNulty, 'The Public Disclosure of Private Facts: There is Life after Florida Star' (2001) 50 *Drake Law Review* 93, 138. See above Chapter Two, 1.2.4.

¹²¹⁴ See also *Hosking* [2003] 3 NZLR 385 (HC) para 106 per Randerson J.

¹²¹⁵ For a concise discussion of the term 'rule of law' in this context see *Hansen v R* [2007] 3 NZLR 1 (SC) para 101 per Tipping J; Lord Steyn, 'Democracy through Law' [2002] *European Human Rights Law Review* 723, 727-8 and P A Joseph, *Constitutional and Administrative law in New Zealand* (3rd ed, 2007) 150-2.

country amounts to nothing more than the following: '[t]here are of course analogies here with qualified privilege in defamation and the iniquity defence in cases of breach of confidence.'¹²¹⁶

It is obvious from their Honours' assertion that the common law is supposed to be the decisive factor in interpreting s 14, which should come as no surprise. Particularly Gault P seems to have followed his general attitude, according to which the NZBoRA only represents a restatement of the law as opposed to auguring a new approach.¹²¹⁷ Ian Leigh has observed similar attitudes among English judges, but convincingly rejected the premise as unconvincing.¹²¹⁸ Be that as it may, the implementation of the US standard alienates the common law of this country from the NZBoRA in a situation where the Act should have had a positive influence on the law. 'Constitutionalisation' is ordinarily driven by the incentive to harmonise the private law sphere with the public law of - the same - legal system.¹²¹⁹ The rationale behind this process is that both direct government action and (today probably even more so) private citizens in modern societies equally endanger enshrined rights, such as freedom of expression.¹²²⁰ The joint judgment, however, harmonises New Zealand's tort of privacy with American tort law without even asking what s 14 actually demands. This turns the very essence of constitutionalisation upside down. In a manner of speaking, the joint judgment produces a cacophony rather than harmony within New Zealand's legal system. In brief, the implementation of *ad hoc* definitional balancing is inappropriate. Their Honours inserted an additional chapter into the already diverse range of interpreting s 5. Thus, I suggest that this 'legitimate public concern' test is not a proper one.¹²²¹ This was not said with reference to the quality of the law; it is, in the author's view, illegitimate *a priori* due to

¹²¹⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 135.

¹²¹⁷ P Rishworth, 'Lord Cooke and the Bill of Rights' in P Rishworth (ed), *The Struggle for simplicity in the law* (1997) 321.

¹²¹⁸ I Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) *International and Comparative Law Quarterly* 57, 82.

¹²¹⁹ See *Campbell* [2004] 2 All ER 995 (HL) para 50 per Lord Hoffmann.

¹²²⁰ See J Norton, 'Hosking v Runting and the Role of Freedom of Expression' [2004] *Auckland University Law Review* 245, 252; in Germany, Hans-Carl Nipperdey observed this phenomenon in his article "Gleicher Lohn der Frau fuer gleiche Leistung" published in *Recht der Arbeit* (1950) 121 as cited in B S Markesinis and S Enchelmaier, 'Human Rights under German Constitutional Law' in B S Markesinis (ed), *Protecting Privacy* (1999) 191, 196; see also S Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387, 395.

¹²²¹ Compare J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.05 at p 763.

its incompatibility with the domestic rule of law. This renders the subsequent second question concerned with the ‘quality’ of the law superfluous.

Finally, their Honours proposed a proportionality test as a third balancing exercise. A direct confrontation - the interrelationship - between both principles in a proportionality test follows if the litigants have met their respective requirements.¹²²² In this respect, their Honours assumed that the importance of freedom of expression would be related to the extent of legitimate public concern in the information publicised.¹²²³ After a matter has been identified as one of public concern, the level of legitimate public concern ‘would have to be such as outweighs the level of harm likely to be caused.’¹²²⁴ The greater the invasion into privacy, ‘the greater will need to be the degree of “public concern”’ to disseminate the material in question.¹²²⁵ However, this test could be described as an add-on proportionality test following the definitional limitation of freedom of speech to matters of public concern. The proportionality test is a ‘cropped’ version compared to the weighing exercise outlined in *Noort* and *Duff*, because it represents only an aspect of the test(s) proposed in those judgments. It may seem to belabour a point, but this approach implies that something identified as a public concern in New Zealand cannot be published automatically. Privacy interests can still outweigh speech of this kind. One might have expected that a public concern would already be the final word and, therefore, prevail in a democratic society.

Burrows has observed that this additional balancing exercise would often be one of some difficulty.¹²²⁶ It does not take much empathy to speculate that he regards this additional test as a problem. Without going into further detail at this stage, this add-on

¹²²² See J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005), para 18.5.05 at p 763, who observes that the requirement of a ‘legitimate public concern’ and the adoption of the highly offensive test ‘does not preclude a proportionality approach.’

¹²²³ *Hosking* [2005] 1 NZLR 1 (CA) para 132.

¹²²⁴ *Ibid*, para 134 using the facts of the *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908 as an example: if the publication was going to cause a major risk of serious physical injury or death, a very considerable level of legitimate public concern would be necessary to establish the defence.

¹²²⁵ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.05 at p 763; see also U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 255.

¹²²⁶ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.05 at p 763.

proportionality test is nevertheless necessary as a minimum reference to s 5 inasmuch as their Honours deliberately decided to be bound by the following standards:¹²²⁷

[w]hile developments in the common law must be consistent with the [...] Bill of Rights Act, such developments are not precluded merely because they might encroach upon those rights and freedoms. *It becomes a matter of whether such common law encroachment meets the test of a reasonable limit on the applicable [...] freedom which is demonstrably justified in a democratic society in s 5.*

Their Honours delineated so far merely the *scope* of s 14 by definitional balancing. Without this add-on proportionality test, however, the courts would perform a limitation process even stricter than the one applied in *Radio New Zealand* because a second limitation step would structurally never take place. In other words, the courts would never proceed to s 5 scrutiny as a matter of *justifying* the limit. As a result, s 14 would be limited exclusively by definitional balancing and, thus, inherently. The NZBoRA nevertheless requires a two-step limitation process, which is why such an approach would not be sustainable.

However, there is indeed a problem here. Their Honours stated that ‘[r]elevant considerations were reviewed in *Duff* [...]’.¹²²⁸ As we remember, Blanchard J suggested that rights should be defined broadly (with some inherent limits) whereas limits should be determined generally pursuant to s 5. His Honour rejected the approach taken in *Radio New Zealand* because such a second step was only deemed necessary given that the scope of s 14 is broad enough to embrace the particular utterance or conduct as ‘expression.’ Instead, the courts were expected to apply both definitional and *ad hoc* balancing in every case.

In contrast to their Honours’ allegation, the public concern conception in *Hosking* does not embrace the theoretically required second step. Given that the plaintiff shows a ‘highly offensive’ invasion of her privacy whilst the defendant, by way of illustration, could only establish a ‘matter of mediocre public interest,’ there would be no

¹²²⁷ *Hosking* [2005] 1 NZLR 1 CA para 111 (emphasis added).

¹²²⁸ *Ibid.*

need to proceed to s 5 - the justification stage of the privacy limit. In my eyes, what has been described as a defence must rather collapse in such a scenario. The defendant has to fight an uphill battle.¹²²⁹ Thus, the privacy interest would prevail over s 14 regardless of the add-on proportionality test. The scope of s 14 would simply not encompass a ‘matter of mediocre public interest’; in other words, it would not be a relevant ‘expression’ for the purposes of the privacy tort. This would suffice to limit freedom of expression without considering any s 5 concerns.¹²³⁰ This, as we know, is not the limitation process outlined in *Duff*, it is a relapse into the process championed in *Radio New Zealand*. The only variation is that the scope of s 14 is additionally determined by using *ad hoc* definitional balancing inspired by US law. The delineation of the freedom’s scope might therefore not be as abstract as in *Radio New Zealand*.

Nonetheless, their Honours opined that the courts could and should act alongside the legislature to protect privacy interests under the premise that any interference with s 14 is justified under s 5 scrutiny.¹²³¹ The privacy tort, however, is not a reasonable limit demonstrably justified in a democratic society in the abstract. As we know, the determination of those factors has to be carried out by means of a balancing exercise. During this context-specific procedure, the relative weight of limit and affirmed right has to be determined in an individual case.¹²³² Such a weighing exercise, as a necessary second limitation step, is not mandatory in this concept.¹²³³ In sum, it is suggested that the joint judgment did not meet its own standards while supposedly applying the *Duff*-standard in *Hosking*. It is only possible to subsume the joint judgments final concept under their Honours’ initial premise if the defendant meets the requirements of the ‘public concern’ test.

An anticipated objection to this result would point to supposed similarities of the joint judgment’s approach to the qualified privilege defence in defamation. A valid

¹²²⁹ J F Burrows, ‘Invasion of Privacy - Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 396.

¹²³⁰ Exactly this stance had been criticised in *Duff* [1996] 2 NZLR 89, 99 (HC) per Blanchard J.

¹²³¹ A Geddis, ‘Hosking v Runtig: A privacy Tort for New Zealand’ (2005) 13 *Tort Law Review* 5, 8.

¹²³² This is also desirable for the purposes of the common law – see U J Cheer, ‘Privacy and the Public Interest’ (2005) 1 *Privacy Law Bulletin* 145, 150.

¹²³³ It is a different matter that the privacy interest of the highly offended plaintiff might usually prevail in such a situation.

point, surely, since even their Honours were arguing by such an analogy.¹²³⁴ I nevertheless beg to differ. This objection would presumably bring arguments from the Court of Appeal's decision(s) in *Lange v Atkinson* to bear.¹²³⁵ The situation there was different though. A defence of qualified privilege, as recommended by the report of the McKay Committee, was not realised in the Defamation Act 1992.¹²³⁶ Thus, the common law development in *Lange* was predominantly driven by creating consistency with the aforementioned Act.¹²³⁷ The Court considered primarily the defamation-specific statutory background (most notably s 19(1) Defamation Act 1992 containing an equivalent to 'actual malice') of the defence and *not* s 5 in order to reconcile personal reputation and freedom of speech.¹²³⁸ Tipping J's unease with the 'ill-will' requirement, which the plaintiff has to show in order to strike down the defence, is otherwise difficult to understand.¹²³⁹ Tipping J finally accepted the view of the other members of the Court in the light of s 19 (1) Defamation Act 1992.¹²⁴⁰ The joint judgment's explicit standard in *Hosking*, by contrast, was that privacy, as a 'common law encroachment,' has to meet the tests included in s 5. There is reason to believe that this is not the case whenever a defendant is unable to show a matter of public concern. Similarities between both constellations are scarce at best. According to my interpretation, it would therefore be inappropriate to draw such an analogy.

Remarks on definitional balancing and conclusion

The balancing test of the joint judgment, thus, consists of definitional balancing, *ad hoc* definitional balancing as well as *ad hoc* balancing. Nevertheless, a direct encounter between privacy and freedom of speech (as necessary for an *ad hoc* balancing test) is marginal in this approach. First, the reasonable person must be highly offended,

¹²³⁴ *Hosking* [2005] 1 NZLR 1 (CA) para 135 per Gault P and Blanchard J.

¹²³⁵ Eg, [1998] 3 NZLR 424 (CA).

¹²³⁶ *Ibid*, at p 474 (CA) per Tipping J.

¹²³⁷ *Ibid*.

¹²³⁸ *Ibid*, at p 468 per Richardson P, Henry, Keith and Blanchard JJ.

¹²³⁹ *Ibid*, at pp 473-4: 'But it is a sad fact that the necessary responsibility is not always shown. In such circumstances, striking an appropriate balance between freedom of expression and individual reputation is not easy. The striking of that balance must be informed by s 5 of the Bill of Rights which, while recognising that there can be limits to individual rights, emphasises that those limits may only be such as can be demonstrably justified in a free and democratic society.'

¹²⁴⁰ *Ibid*, at p 475 ('In spite of my anxiety about creating an erroneous balance, I nevertheless consider that it is in the overall public interest to develop the law of qualified privilege as indicated in the judgment of the other members of the Court. I am encouraged to take that view by the existence in s 19(1) of the concept of taking improper advantage of the occasion').

which will normally require an intense invasion of privacy¹²⁴¹ or the plaintiff has no actionable case. Secondly, freedom of speech is not defined ‘as wide as human thought and imagination’ for the purposes of the new privacy tort. This would require embracing, for instance, matters of general public interest or public curiosity as well as matters of legitimate public concern. A balancing exercise including both privacy and freedom-of-speech concerns follows only if the litigants meet their respective tests.

Although the *Duff*-concept was incorrectly applied in *Hosking*, some general remarks regarding the appropriateness of definitional balancing should be made. The combination of definitional and *ad hoc* balancing depends on Blanchard J’s basic assumption that some inherent limits can be read into the scope of freedom of expression. This premise might be open to criticism. As we recall, s 14 includes the freedom to impart information and opinions of any kind and form. The wording makes it rather difficult to confine freedom of speech to matters of ‘public concern’ for the purposes of the new privacy tort. Moreover, it is not an easy task to identify how this approach could be aligned with Blanchard J’s own suggestions. How can such a confinement be reconciled with his Honour’s notion that the term expression ‘should be defined widely, and that questions on limits of the right should generally be determined through s 5’?¹²⁴² Keith J, on the other hand, was perfectly right in stating that ‘information and ideas *of any kind*’ are protected under the scope of the right.¹²⁴³ Furthermore, Randerson J may have followed a different avenue by propagating the use of breach of confidence to protect privacy interests; the Judge was nonetheless right in stating:¹²⁴⁴

[t]he right under s 14 of the Bill of Rights Act is subject to justified limitations under s 5. But where any such limitations are proposed, [...], *the approach adopted* should reflect the principles established by the Court of Appeal in [*Moonen (No 1)*]. [...]. First, any limitation on the guaranteed right may only be the least required to achieve the desired objective and then, only where it would constitute a reasonable limit which may be demonstrably justified in a free and democratic society. Secondly, the evaluation of these matters is a complex exercise involving

¹²⁴¹ J F Burrows, ‘Invasion of Privacy - Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 394.

¹²⁴² *Duff* [1996] 2 NZLR 89, 99 (HC).

¹²⁴³ *Hosking* [2005] 1 NZLR 1 (CA) para 178; see also M Richardson, ‘Privacy and Precedent: The Court of Appeal’s Decision in *Hosking v Runtig*’ (2005) 11 *New Zealand Business Law Quarterly* 82, 92.

¹²⁴⁴ *Hosking* [2003] 3 NZLR 385 (HC) para 170 (emphasis added).

the balancing of a wide range of considerations and, ultimately, the making of a judgment on behalf of the society.

Rishworth's remark may finally illustrate the inappropriateness of the joint judgment's approach:¹²⁴⁵

[i]t cannot be said that the right [freedom of expression] is 'intrinsically limited' on the basis that 'some forms of expression are not within the guarantee, nor can a particular form of expression be excluded from the right simply because it is in breach of the law. The terms in which the right is set out in s 14 *preclude this sort of definitional balancing*.

Apart from the wording of s 14, no systematic argument assists the joint judgment. Almost ironically, s 21, which concerns privacy issues, protects merely against 'unreasonable search and seizure.' The use of the term 'unreasonable' suggests that an inherent limit has to be read into the scope of the right.¹²⁴⁶ It follows from this that the NZBoRA makes it clear when inherent limits have to be taken into consideration. Section 14 precludes any form of definitional balancing and *any* limit has to be determined pursuant to s 5.

Considered in aggregate, the author concludes that the joint judgment has presented a concept he finds himself incapable of sharing. The adoption of the US standard was already an incompatible novelty in defining and limiting NZBoRA rights. Moreover, the concept reveals logical flaws when tested against their Honours' own standards and is for these reasons alone a red herring. In my view, another chapter should not be inserted into the already diverse range of interpretations of s 5. Their Honours' approach should consequently be rejected. We will now turn to the balancing approach proposed by Tipping J.

¹²⁴⁵ P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 312 (emphasis added).

¹²⁴⁶ Although this inherent limit had been described as 'internal modifier' in New Zealand – P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.6.9.

1.1.4.3 The balancing exercise of Tipping J

Tipping J's approach has not received much attention so far.¹²⁴⁷ His Honour paid closer attention to s 5 during his separate judgment in support of the majority.¹²⁴⁸ This might even be the main reason for the limited interest; one might have the distinct impression that the NZBoRA is the 'black sheep'¹²⁴⁹ of New Zealand's legal family. However, one has to give his Honour the respect due to him not merely for the appreciation of the Act. Even apart from that, he is clearly *primus inter pares* among the Judges in *Hosking*. The following observations on his Honour's judgment will explain why this is the case. The validity of the assertion that there is 'much common ground between the two variants of the majority view' will be analysed.¹²⁵⁰ As I hope to demonstrate, this is not the case.

Tipping J preferred, in contrast to his colleagues in the majority, a two-step *ad hoc* balancing exercise as envisaged in the White Paper and employed in the UK. This approach presupposes (1) a definition of the scope of s 14 as being as wide as human thought and imagination; and (2) a justification stage applying a proportionality test. The judgment, nevertheless, reveals an existing uncertainty regarding the relationship of enshrined rights and freedoms with limits pursuant to s 5. The following exposition will carve out a suggestion as to how this issue could be handled in this context.

The two-step limitation process

His Honour saw the courts engaged in reconciling competing values.¹²⁵¹ He consequently identified the values underlying freedom of speech and privacy.¹²⁵² According to him, the values underlying freedom of speech manifest themselves in the marketplace of ideas theory, the maintenance and support of democracy theory and the

¹²⁴⁷ For the most accomplished treatment see U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 248-9.

¹²⁴⁸ *Ibid*, at p 248.

¹²⁴⁹ Or rather the 'unwanted child' – see D Haywood, 'Bill of Rights unlikely to grow up' published in the New Zealand Herald on 28 August 2006.

¹²⁵⁰ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.02 at p 756.

¹²⁵¹ *Hosking* [2005] 1 NZLR 1 (CA) para 224.

¹²⁵² See P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.9.3.

liberty theory.¹²⁵³ This is, as we know, a keystone in achieving results other than those in the USA since content neutrality is not what will be maintained in this model. Furthermore, this approach interprets speech ‘systemically’ as distinct from an ‘episodic’ approach.

The first limitation step will now be examined. The definition of the scope of s 14 was admittedly not pronounced as pithily as in *Moonen (No1)*, where it has been described as being ‘as wide as human thought and imagination.’ His Honour’s approach on limiting affirmed rights and freedoms, nevertheless, presupposes such a broad definition of freedom of speech, at least, implicitly. After describing the three aforementioned theoretical foundations of freedom of expression, Tipping J continued by sketching the general relationship of these types with privacy.¹²⁵⁴ His Honour concluded that ‘any pragmatic or concrete benefit’ of speech values has to pass the s 5 threshold.¹²⁵⁵ The Judge particularly paid attention to the benefits of the liberty theory, which he summarised as saying, ‘that it is for the ultimate good of society for citizens to be able to say and publish to others what they want.’¹²⁵⁶ This liberty certainly embraces the freedom of the media to publish material of, for instance, a mere gossip character. Moreover, Tipping J envisaged circumstances in which ‘the publication [of personal information] served little or no public good, save an abstract upholding of the liberty theory.’¹²⁵⁷ This, however, presupposes that freedom of speech embraces ‘low-level’ speech for the purposes of the new tort in the first place.

The public interest feature of Tipping J’s conception of the new privacy tort, therefore, embraces speech of every kind. A protected expression represented in the context of the tort could be anything, *inter alia*, from material of a mere gossip, commercial or artistic nature to material of political importance (ie, from the ‘lowest’ human interest to the highest public concern). In contrast to the approach of the joint

¹²⁵³ *Hosking* [2005] 1 NZLR 1 (CA) para 233 referring to P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 308. This approach was met with approval in *Brooker v Police* [2007] 3 NZLR 91 para 243 per Thomas J.

¹²⁵⁴ *Ibid*, paras 233–4 observing that speech of the first two categories would normally prevail over privacy interests while substantive problems are likely to occur with speech fitting in the liberty theory.

¹²⁵⁵ *Ibid*, para 234 (emphasis added).

¹²⁵⁶ *Ibid*.

¹²⁵⁷ *Hosking* [2005] 1 NZLR 1 (CA) para 256.

judgment, the public interest can be ‘as wide as human thought and imagination’ for the purposes of the first limitation step.¹²⁵⁸

The difference to the joint judgment is evident: a definitional balancing exercise of any kind regarding the scope of freedom of speech does not take place in Tipping J’s approach. I am unable to identify common ground between an approach embracing public interests of any kind and another one tightly confining speech to ‘matters of public concern.’¹²⁵⁹ The scope of s 14 cannot be wide and narrow at the same time. Thus, it is suggested that there is no such thing as two variants of the majority view in New Zealand. Variants can be juxtaposed and two or more possibilities can co-exist. The two views of the majority, however, are rather alternatives in the sense that an alternative is one of two things that can be chosen. Having said that, the scope of s 14 for the purposes of the tort is either wide (as proposed by Tipping J) or narrow as (propagated by the joint judgment). In sum, a choice between the two has to be made.¹²⁶⁰

The discussion will now turn to the justification stage, that is, the independent second limitation step. In this respect, his Honour’s preference for a wide interpretation of freedom of speech becomes even more evident. For the following independent second step, Tipping J proposed an approach, which he characterised as a manifestation of proportionality.¹²⁶¹ In the end, the Courts have to make a ‘judgment on behalf of society as to where the balance falls.’¹²⁶² This observation is in line with *Noort* where the Court of Appeal argued there that the interpretation of s 5 involves a ‘public policy

¹²⁵⁸ See also Tipping J’s judgment in *Quilter v Attorney-General* [1998] 1 NZLR 523, 576 (CA): ‘In short, I would prefer to define the right (that is to be free from discrimination) with the purpose of anti-discrimination laws in mind, and then consider whether any suggested limitation is justified or otherwise lawful rather than circumscribe the content of the right at the outset. This accords more with the spirit and purpose of the Bill of Rights. In this kind of case it is better conceptually to start with a more widely-defined right and legitimise or justify a restriction if appropriate, than to start with a more restricted right. Of course any such restriction or legitimisation will, as is its purpose, pro tanto abrogate the right; but if restrictions which may be legitimate or justified in some circumstances are built into the right itself the risk is that they will apply in other circumstances when they are not legitimised or justified.’

¹²⁵⁹ In US law, the viability of the Restatement’s ‘public concern’ had been questioned by many because of the value of gossip – see, eg, J B Mintz, ‘The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain’ (1996) 55 *Maryland Law Review* 425, 445.

¹²⁶⁰ See also U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 248.

¹²⁶¹ *Hosking* [2005] 1 NZLR 1 (CA) para 235.

¹²⁶² *Ibid*, para 236.

analysis and a value judgment on the part of the Court.’¹²⁶³ This approach is also solely compatible with what had been envisaged by the drafters of the White Paper Bill: the application of s 5 does not only involve a careful reading of the precise words of the provision but rather the use of a weighing exercise.¹²⁶⁴ His Honour suggested

that the *nature* of the information imparted may well have a bearing on the reasonableness and justifiability of the limitation in the issue. [...] The *more value* to society the information imparted or *the type of expression in question may possess, the heavier* will be the task of showing *that the limitation is reasonable and justified*. [...] There may well be a *greater potential* for legitimate *public concern* about information imparted as part of the marketplace of ideas or in support of the *democratic process* than there is with information, the imparting of which is supported only by the abstract of the *theory of liberty*.¹²⁶⁵

Although carefully pronounced, this statement is perfectly in line with the second step of an *ad hoc* balancing test. In terms of clarity and precision, it even trumps Baroness Hale’s observation in *Campbell*.¹²⁶⁶ In the context of the respective American law, we have associated a similar view with Justice Breyer’s judgment in *Bartnicki v Vopper*.¹²⁶⁷

As we recollect, a court is expected ‘to have regard to the importance of the particular type of expression’ during the justification stage.¹²⁶⁸ Different kinds of speech carry different importance or weight in the balance. This is because the first step hardly matters in limiting speech/the public interest. The first step is rather an unpretentious prelude to the following weighing exercise. Lest we forget that the public interest can also embrace, by way of illustration, an interest in the distribution of child pornography. According to his Honour’s terminology, speech of this type fits into the liberty theory and is embraced by the freedom to say and publish what citizens want.

¹²⁶³ *Ministry of Transport v Noort; Police v Curren* [1992] 3 NZLR 260, 283 (CA) per Richardson J; this opinion had been reiterated by Randerson J - see *Hosking* [2003] 3 NZLR 385 (HC) para 170.

¹²⁶⁴ See White Paper, para 10.31.

¹²⁶⁵ *Hosking* [2005] 1 NZLR 1 (CA) para 235 (emphasis added).

¹²⁶⁶ *Campbell* [2004] 2 All ER 995 (HL) para 148 per Baroness Hale.

¹²⁶⁷ 532 US 514, 536 (2001).

¹²⁶⁸ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.6.1.

Tipping J indicates that the more value the type of expression carries, the more difficult it would be for a competing value, such as privacy, to outweigh speech concerns. The nature of the information imparted may impinge on reasonableness and justifiability of the limitation. Although he described a balancing process in which freedom of expression could be represented by almost every ‘public interest,’ he called the feature a matter of legitimate ‘public concern’ analogous to the breach of confidence doctrine.¹²⁶⁹ Nevertheless, Tipping J reiterated afterwards that this is ‘no more than another application of the need for proportionality.’¹²⁷⁰ In this respect, he divided the value or importance of speech into three categories following the three aforementioned theories underlying speech. Expression fitting in the marketplace of ideas or democratic process segment is more valuable in comparison to speech represented by the liberty theory.¹²⁷¹ Matters fitting into the first two categories have, therefore, greater potential for being of legitimate public concern. Speech fitting within the confines of the liberty theory, by contrast, has to suffer ‘some curtailment’ in an organised society.¹²⁷² His Honour continued that the weight one gives to privacy - the second interest in the balance - would be a matter of assessing the facts of the individual case.¹²⁷³

The concept is very similar to the approach taken in the UK. In *Campbell*, as we know, two Law Lords distinguished different types of speech, identifying political, artistic or educational speech as more important or valuable in a democracy than commercial speech.¹²⁷⁴ In the author’s view, the respective categories may have been named differently in New Zealand, but that does not affect the substance of the limitation process itself. The methods are strikingly similar, if not identical. Judges in both aforementioned legal systems do not have to afford different weight to certain types of speech. Due to its importance in a democracy, the respective kind of speech itself carries a particular weight in the balance. Political speech, for example, does not ‘deserve’ more protection in a strict sense, it ‘takes care of itself’ by carrying the utmost weight in

¹²⁶⁹ *Hosking* [2005] 1 NZLR 1 (CA) para 257.

¹²⁷⁰ *Ibid.*

¹²⁷¹ U J Cheer, ‘The Future of Privacy – Recent Legal Developments in New Zealand’ (2007) 13 *Canterbury Law Review* 169, 191.

¹²⁷² *Hosking* [2005] 1 NZLR 1 (CA) 234 (‘[t]herein lies the conundrum’).

¹²⁷³ *Ibid.*, para 237.

¹²⁷⁴ *Campbell* [2004] 2 All ER 995 (HL) para 148 per Baroness Hale; para 117 per Lord Hope.

the balance and will usually prevail.¹²⁷⁵ In brief, there arguably exists more than one approach in New Zealand.¹²⁷⁶ Tipping J's account, I propose, is in tune with the law of the UK, whereas the joint judgment predominantly goes down the US avenue.

It is beyond doubt that '[a]ll judges in the majority stated that the greater the invasion of privacy the greater the level of public concern must be for the defence to succeed.'¹²⁷⁷ That is why the author would describe the 'cropped' proportionality test championed by the joint judgment as a 'variant' of Tipping J's proportionality test.¹²⁷⁸ The latter test is more complex but contains the former as an element. Both tests can therefore co-exist. Nevertheless, the approaches as a whole represent alternatives rather than variants.¹²⁷⁹ In brief, it is suggested that the majority in *Hosking* contains two distinct approaches for New Zealand rather than 'the' approach.

Privacy and freedom of speech in the balance

However, Tipping J indicated that speech fitting only in the broad liberty theory might well be outweighed by privacy interests; freedom of speech would nevertheless have a 'head start'.¹²⁸⁰ Without the last statement, his Honour's approach could be interpreted as saying that privacy and freedom of speech were equal in principle. The reconciliation would be carried out purely on the facts of the individual case as in the UK. A 'head start' of freedom of expression calls this equality into question. Hence, the actual relationship of freedom of expression with privacy is of additional interest and will be considered next. Are both equal for the purposes of a 'constitutionalised' common

¹²⁷⁵ See above Chapter Three, 1.1.3.2.

¹²⁷⁶ Compare U J Cheer, 'Privacy and the Public Interest' (2005) 1 *Privacy Law Bulletin* 145, 149 (emphasis added).

¹²⁷⁷ Ibid, at p146; see also J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.05 at p 763.

¹²⁷⁸ All judges in the majority identified what Alexy calls the 'Law of Balancing' – R Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572, 573 ('The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other'). See also M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574, 580; A Barak, 'Proportional Effect: The Israeli Experience' (2007) 57 *University of Toronto Law Journal* 369, 381.

¹²⁷⁹ What might be called the Law of Balancing is merely one of several sub-tests – R Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572, 573.

¹²⁸⁰ *Hosking* [2005] 1 NZLR 1 (CA) para 234.

law or does a kind of successive order, triggered off by a distinction between ‘enshrined right’ and ‘limit’, exist? His Honour, speaking extra-judicially, clarified his position by mentioning that

he did *not* regard privacy and freedom of expression as *starting on an equal footing* in any balancing exercise, as in the United Kingdom, because a privacy right is not included in the New Zealand Bill of Rights Act 1990. For Tipping J freedom of expression would appear to have greater *initial weight*, although it could still be trumped by privacy *where appropriate*.¹²⁸¹

His Honour apparently came to this conclusion by comparing the NZBoRA and the HRA, which gives further effect to the right to privacy (art 8 ECHR).¹²⁸² As a result, Tipping J concluded that a proportionality test treating privacy and freedom of speech equally in principle could not take place in New Zealand. Instead, a successive order exists, expressed through an ‘initial weight.’ The author interprets the term as being synonymous with a ‘head start.’ This additional remark, however, makes Tipping J’s whole concept difficult to apply in practice. Since freedom of speech bears some kind of initial weight, even a sufficient but average invasion of privacy must not necessarily outweigh speech of comparatively low public interest.

An ‘initial weight’ afforded to freedom of speech seems akin to the dated position of the Supreme Court of California that the balance always has to be weighed in favour freedom of speech.¹²⁸³ In other words, Tipping J’s statement seems to imply placing a thumb on freedom of speech’s side of the balance. The outcome of the case may be more open in New Zealand in comparison to the USA, but still depends on the heaviness of thumb of the respective judge.¹²⁸⁴ To remain in this metaphor, the thumb of Keith or Anderson JJ is presumably heavier than the one of Tipping J. This, it seems

¹²⁸¹ Quoted in U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 249 fn 107 (emphasis added); see also U J Cheer, ‘Privacy and the Public Interest’ (2005) 1 *Privacy Law Bulletin* 145, 146.

¹²⁸² See too *Andrews v TVNZ* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 40.

¹²⁸³ *Briscoe v Reader’s Digest Association Inc*, 93 Cal Rptr 866, 872 (1971).

¹²⁸⁴ See also A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*’ [2004] *New Zealand Law Review* 681, 702.

reasonable to suggest, is why one may harbour doubts as to whether an ‘initial weight’ on one side of the balance would produce consistent results in practice.¹²⁸⁵

Ad hoc balancing requires a clear scale to translate the value of interests into a ‘common currency’ for comparison; the personal scale of the balancer is an inappropriate standard, lest balancing becomes an arbitrary act of will.¹²⁸⁶ McGrath J expressed an important observation when he stated in *Booker v Police*:¹²⁸⁷

[t]rue balancing has connotations of quantity and precision when used to describe relative weights of, for example, quantities of metal. Only if this aspect of the balancing metaphor is respected will its application ensure full recognition of the significance of each competing interest in the particular circumstances of the case.

The notion of an ‘initial weight,’ in contrast, seems incompatible with both a common currency and the required precision described by McGrath J. In sum, the term needs further specification in a context other than this analysis; the concept is otherwise very arguably unworkable.

Rights and limits in the balance

An unworkable approach would normally be the end of the matter, but Tipping J’s judgment deserves, I think, more support. Thus, we will revisit the relationship between ‘enshrined rights’ and ‘limits.’¹²⁸⁸ This underlying issue was responsible for an ‘initial weight’ that freedom of speech appears to carry in the balance. It should be noted at the outset that this is actually not a matter of practical law; it is rather a matter of legal theory and philosophy. Are the limitations that the judiciary places on an affirmed right as important as the rights themselves?¹²⁸⁹ Does a legal system allow unequal rights and/or limitations?

¹²⁸⁵ For an affirmative view see U J Cheer, ‘The Future of Privacy – Recent Legal Developments in New Zealand’ (2007) 13 *Canterbury Law Review* 169, 196.

¹²⁸⁶ T A Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 943, 973.

¹²⁸⁷ [2007] 3 NZLR 91 (SC) para 134 (internal citation omitted).

¹²⁸⁸ See also *Brooker v Police* [2007] 3 NZLR 91 paras 209 per Thomas J.

¹²⁸⁹ See P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.9.3.

At this point, we return to the phrase constitutionalisation of private law; this is where the common law methods, focusing on liberty rather than rights, may conflict with mechanisms provided by the NZBoRA. The difficulty is that constitutional or human rights doctrines are ordinarily not elaborated through the application of common law. This is rather a task for a specialised court. Judges in the UK may receive valuable information from the ECtHR whilst the Federal Supreme Court assists their counterparts in the USA.¹²⁹⁰ Two scholars observed that New Zealand's judges, by contrast, give answers to doctrinal and theoretical issues in the 'unusual guise of common law rationality',¹²⁹¹ and, therefore, within the application of practical law. Common law judgments and doctrinal issues of this country's Bill of Rights are apparently made in an all-in-one fashion based, for instance, on 'a combination of resort to international provisions, comparative law, existing statute and common law.'¹²⁹² In short, it is a thankless task for a common law judge. While criticism of any kind is hence inappropriate, Tipping J's elaboration on this point is nonetheless an apt example of this phenomenon. The Judge found privacy explicitly protected in the UK and principally equal in the balance. This observation is, of course, correct. However, according to his Honour's following observation based on comparative law, the privacy interest has not been relevantly recognised in the NZBoRA and, by inference, could not start on an equal footing in any balancing exercise.¹²⁹³

It will now be analysed whether this conclusion is compelling. The whole matter, admittedly, might be aloof to some common-law lawyers. For the sake of convenience, we should hence approach with a scholarly 'Oxbridge'-competition by way of illustration. A scholar represents each university. Each scholar has examined the theoretical relationship between rights and the possibilities to place limits on them. Habermas represents Cambridge and vehemently opposes a balancing exercise of constitutional rights. According to Habermas, such an approach denies the *strict priority* of

¹²⁹⁰ New Zealand's Supreme Court taken over this function - see *Brooker v Police* [2007] 3 NZLR 91 (SC) paras 149-285 per Thomas J for an impressive example.

¹²⁹¹ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.9.7.

¹²⁹² Ibid.

¹²⁹³ The problem is essentially the same in the USA, because freedom of speech is the only explicit constitutional right in play - P Gewirtz, 'Privacy and Speech' [2001] *Supreme Court Review* 139, 173 fn 115.

rights over other interests.¹²⁹⁴ According to this scholar, freedom of expression must prevail over privacy, for instance, in New Zealand simply as a matter of hierarchy. Moreover, this approach tends towards an absolutist position.¹²⁹⁵ Alexy, the second scholar, represents Oxford. Alexy advocates balancing as an appropriate method for the adjudication of constitutional rights. As we recollect, balancing ‘permits recognition of the conflicts between individual rights and collective interests, both of which have the character of principles that should be optimised to the greatest extent possible.’¹²⁹⁶ This theory reflects the view of a balancer and the actual optimisation process is carried out by means of a proportionality test.¹²⁹⁷ Linking rights, conceptualised as principles, to a proportionality balancing exercise is thus understood as a conceptual necessity rather than one of institutional convenience.¹²⁹⁸ This is, I suggest, why one must firmly keep in mind that the comparatively weak status of the right is always accompanied by the necessary application of the proportionality principle.

For the situation in the UK after the enactment of the HRA, Oxford is leaving Cambridge behind in the competition. ‘Limit’ is perhaps most accurately described as a generic term in this respect, because it could be either another affirmed right or another societal interest as long as it constitutes a private right of the national law. The status of the limiting principle – affirmed as a constitutional or human right or not - is of minor interest as long as it is ‘necessary in a democratic society’, echoes a ‘pressing social need’ and is otherwise proportionate. In ‘Oxford methodology’, right and appropriate limit are equal allowing the principles to be optimised to the greatest extent possible. ‘Optimisation’ enables the courts to identify positions between otherwise totally pre-

¹²⁹⁴ J Habermas, *Between Facts and Norms* (W Rehg trans, Cambridge, Massachusetts, 1996) 256. Priority creates in Habermas’ parlance ‘rights as firewalls’; similar accounts could be found in the works of Ronald Dworkin (‘rights as trumps’) and John Rawls (‘priority of the Right over the Good’) - see M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 590.

¹²⁹⁵ See *ibid*, at p 259 for the possibility to place limits on rights.

¹²⁹⁶ R Alexy, *A Theory of Constitutional Rights* Oxford University Press, 2002 summarised by P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) para 6.9.3 in fn 80 (emphasis added); see also M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 576.

¹²⁹⁷ See M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 576.

¹²⁹⁸ M Kumm, ‘What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement’ at p 8 <<http://www.lsr.nelco.org/nyu/plltwp/papers/46> at 08 February 2008>.

vailing principles.¹²⁹⁹ Instead, each principle might prevail only to a degree, which might be described as the appropriate ‘shade of grey’ between the competing principles depending on the facts of the case. The fact that freedom of expression and privacy are both enshrined rights in the UK is a mere coincidence and makes a proportionality test rather more difficult.¹³⁰⁰ Phillipson addresses these difficulties by arguing, sensibly, that a ‘dual exercise in proportionality’ needs to be carried out.¹³⁰¹ However, as Baroness Hale observed with irreproducible transparency:

Article 10(2) [ECHR] provides for ‘the protection of the reputation *or rights of others*’ [...]. The *rights* referred to may *either* be *rights protected under the national law* or, as in this case, *other convention rights*. [...] Above all, the interference or restriction must be ‘necessary in a democratic society’; it must meet a ‘pressing social need’ and be no greater than is proportionate to the legitimate aim pursued. [...]

The application of the proportionality test is more straightforward when only *one convention right* is in play: the question then is whether *the private right* claimed offers sufficient justification for the degree of interference with the *fundamental right*. It is much *less straightforward* when *two convention rights* are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a ‘pressing social need’ to protect it.¹³⁰²

As an interim result for the UK, a limit not represented by a Convention right can be as fundamental as an enshrined right under a doctrinal ‘Oxford regime.’¹³⁰³ In other words, even if a right of privacy had not been enshrined in art 8 ECHR, it would suffice that it is a private right. Such a right may limit art 10 ECHR as long as it is appropriate in the light of the facts of the case. The situation is similar, for example, in Israel. As Barak has observed: ‘[t]he second question [the justification stage] relates to

¹²⁹⁹ It should be noted that ‘optimisation’ itself is a concept disputed by those favouring the supremacy of individual rights over societal interests – eg, J Rawls, *A Theory of Justice* (OUP, 1971) 29-30. Rawls’ criticism of utilitarianism, in my opinion, applies to Alexy’s ‘rights as principles’ model as well.

¹³⁰⁰ ‘More difficult’ means that the court has to deal with two separate limitation clauses in the UK – arts 8 (2) and 10 (2) ECHR.

¹³⁰¹ G Phillipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 214.

¹³⁰² *Campbell* [2004] 2 All ER 995 (HL) paras 139, 140 (emphasis added).

¹³⁰³ See also M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 590.

the limitation upon the scope of the [enshrined] right by *non-constitutional norms* (regular statutes *or common law*).¹³⁰⁴ Burrows points out that *some rights* not codified in the NZBoRA may still have the *same force*; the difference between the situation in the UK and New Zealand, nevertheless, should be borne in mind.¹³⁰⁵ However, as the previous observation propounds, a difference between both countries does not necessarily exist.¹³⁰⁶ A comparative law analysis, which points to an ostensible difference (that would make no difference in the UK as such), cannot represent a compelling difference for New Zealand's situation. To my mind, this simply flows as a matter of logic. This, it seems reasonable to suggest, illustrates that the decisive factor in this area of the law is the doctrinal relationship between right and limit. In the author's view, Tipping J's comparative law analysis is to be welcomed but is not compelling.¹³⁰⁷ It provides, thus, no compelling reason to fortify freedom of speech with an 'initial weight' in this country. The development of the necessary doctrine, however, is out of the scope of this thesis. For the purposes of this examination, we will rather stick to our 'Oxbridge' competition. Hence, a doctrinal solution for New Zealand could be an 'Oxford regime,' a 'Cambridge regime' or a mixed 'Oxbridge regime.'

The author would like to stress that this seemingly innocuous issue is in his view indeed an important one. What *Hosking* was all about, was whether a new tort should form part of the common law. This tort, designed to protect an aspect of privacy, can be regarded as conferring a new 'private right' in terms of the 'Oxford regime' exemplified by Baroness Hale. At issue was whether 'private right' is equipped with the potential to limit freedom of speech as an affirmed right. Anderson J was thus on the right track when he mentioned that the acknowledgement of the new tort required an analysis of the relationship between the privacy value as a limit of an enshrined right.¹³⁰⁸ His Honour stated that, 'cases such as the present are not about invasion of

¹³⁰⁴ A Barak, 'Proportional Effect: The Israeli Experience' (2007) 57 *University of Toronto Law Journal* 369, 381-2 (emphasis added).

¹³⁰⁵ J F Burrows, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389, 397; see also J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.4.04 at pp 753-54.

¹³⁰⁶ Compare *Andrews v TVNZ Ltd* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 40.

¹³⁰⁷ It should be stressed that *Campbell* was of course decided a few weeks after *Hosking*.

¹³⁰⁸ *Hosking* [2005] 1 NZLR 1 (CA) para 263.

publication; and they are not about competing values, but whether an *affirmed right* is to be limited by *a particular manifestation of a value*.¹³⁰⁹ To my mind, the term ‘private right’ can be taken as a less cryptic synonym for ‘particular manifestation of a value.’ As distinct from Lady Hale’s suggestion, such a right does not seem to be sufficient to limit a fundamental right in his Honour’s concept. In our methodology, Anderson J seems to propagate a ‘Cambridge regime.’ Enshrined rights at least tend strongly towards a *strict priority* over other interests.¹³¹⁰ At first sight, this was a powerful argument against the very existence of the privacy tort. However, it is possible to deprive such a seemingly powerful argument of its mystique if an ‘Oxford regime’ or perhaps an ‘Oxbridge regime’ would have been in place. Such a ‘Cambridge’ argument perhaps would have never been raised if the doctrinal relationship between right and limit would be unambiguous. It should be reiterated that Keith and Anderson JJ favoured a very direct impact of NZBoRA on the private law sphere.¹³¹¹ A ‘Cambridge regime’, however, is barely arguable in New Zealand just as the direct application of the Act to private litigants. Enshrined rights are not absolute under the Act. Furthermore, such an approach cannot explain why some limits, not codified in the NZBoRA, have the same force as enshrined rights whilst a ‘manifestation of the privacy value’ has not. I suggest that a legal system must provide an explanation for such an allegation.¹³¹² If it were otherwise, enshrined rights would sometimes have strict priority over conflicting private rights and societal concerns and sometimes not – this would be an unconvincing solution.

An initial weight afforded to freedom of expression by Tipping J, however, points to an ‘Oxbridge regime.’ The placement of an ‘initial weight’ on freedom of expression recognises to a limited degree the priority of affirmed rights as a ‘Cambridge’ influence. Nonetheless, the fundamental right can still be limited in a weighing exercise by other interests as an influence of the ‘Oxford regime.’ A brief examination suggests that Tipping J’s approach is still arguable; it is compatible with the notion that rights

¹³⁰⁹ Ibid, para 266 (emphasis added).

¹³¹⁰ See also J Habermas, *Between Facts and Norms* (W Rehg trans, Cambridge, Massachusetts, 1996) 259.

¹³¹¹ See above Chapter Three, 1.1.1.2.

¹³¹² See J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 397.

and limits may be either equal or unequal.¹³¹³ In New Zealand, at least privacy would be unequal as a limit.¹³¹⁴ Inequality of right and limit suggests, however, that another overriding standard has to be developed in order to determine when it is *appropriate* for privacy interests to prevail over freedom of speech and its ‘initial weight.’ As we know, a ‘common currency’ for the comparison of interests is required for an *ad hoc* balancing exercise.

Thus, the present writer supports an ‘Oxford regime.’ This decision is limited to the situation of the new privacy tort. Privacy, as the underlying value, is widely regarded as a fundamental.¹³¹⁵ In New Zealand, it has already been described as a quasi-constitutional right.¹³¹⁶ In *Radio New Zealand*¹³¹⁷, for instance, the Full High Court identified the values underlying the law of contempt and concluded, ‘[t]hey are at least as fundamental as the freedom of expression.’ Tipping J, as we know, analysed the values underlying the new privacy action in *Hosking*¹³¹⁸ and opined that they were ‘recognised less directly, but no less significantly’ in comparison to those underpinning freedom of speech. Thus, it would require a considerable degree of hair-splitting to argue that the law of contempt starts on equal footing with freedom of speech whereas privacy has to take on the same freedom fortified by an ‘initial weight.’ If no right to privacy is recognised, the test should be whether the values underlying the limit are as fundamental as those underlying the enshrined right.¹³¹⁹ With regard to privacy, this is the case in the author’s view. In short, it is suggested that it is not justified to equip freedom of speech with an ‘initial weight’ in the balance.

¹³¹³ See P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.9.4.

¹³¹⁴ For a view to the same effect see G Phillipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 213-4.

¹³¹⁵ *Brooker v Police* [2007] 3 NZLR 91 (SC) para 232 per Thomas J; P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.9.9. An emphatic statement could be found in *Campbell* [2004] 2 All ER 995 (HL) para 12 per Lord Nicholls (‘[Privacy] lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual’).

¹³¹⁶ U J Cheer, ‘The Future of Privacy—Recent Legal Developments in New Zealand’ (2007) 13 *Canterbury Law Review* 169, 196.

¹³¹⁷ [1994] 1 NZLR 48, 64.

¹³¹⁸ [2005] 1 NZLR 1 (CA) para 224.

¹³¹⁹ See also P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.9.9.

1.1.5 Conclusion

Reconciling of freedom of expression and privacy is an onerous task.¹³²⁰ Dealing with this matter in New Zealand once the NZBoRA has been held applicable to the new tort even magnifies these complications. The constitutionalisation of the common law would require interpretative clarity of the relevant issues of the human rights instrument before they can be transposed. To ensure this clarity could be regarded as ‘Phase I’ in a process that ordinarily has to be accomplished before constitutionalisation of private law as ‘Phase II’ can commence. *Hosking* reveals some unanswered questions in this respect, which led to the rejection of the tort by the minority and to the adoption of effectively two distinct torts of privacy by the majority.

Particularly the judges of the minority interpreted the Act in a way that apparently suited their respective preferences regarding the acknowledgement of the tort. The result can be described as a sophisticated form of shadow-boxing. If the underlying issues of ‘Phase I’ remain unsolved, judges are likely to argue interminably at cross-purposes in ‘Phase II.’ The arguments will always sound ‘strong’¹³²¹ if the underlying issues are not identified and solved. In fairness, it must be stated that this is the preferred treatment of this country’s human rights instrument.¹³²² Judges and scholars recognise that ‘in all discussions of [this] subject section 14 of the Bill of Rights Act must be kept firmly in mind.’¹³²³ At the same time, jurists seem to believe that they are ‘free of those constitutional constraints’ which can be found in the UK due to developments in Europe.¹³²⁴ Nevertheless, we have seen that NZBoRA bears striking similarities to the ECHR whilst similarities to the US Constitution are difficult to identify. Section 14, for instance, poses a (quasi-) constitutional restraint on the courts. This constraint prevents judges from confining freedom of speech to matters of public concern by means

¹³²⁰ Perhaps ‘one of the most difficult and sensitive areas of judgment’ – see *Mafart v TVNZ Ltd* [2006] 3 NZLR 534 (CA) para 53 per Hammond J (internal citation omitted). G Phillipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 212.

¹³²¹ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.02 at p 755.

¹³²² P Rishworth, ‘Lord Cooke and the Bill of Rights’ in P Rishworth (ed), *The Struggle for simplicity in the law* (1997) 295, 307.

¹³²³ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 391.

¹³²⁴ *Ibid*, at p 397.

of definitional balancing. In short, given that horizontal application of the NZBoRA means anything, the law must certainly be aligned with the British approach rather than the American.

However, Tipping J is a clear exception to this phenomenon. His Honour suits the action to the word and represents the consistency and continuity that a human rights instrument requires. The joint judgment, by contrast, is a disorganised and peculiar combination of European and US influences without paying due regard to domestic law. Rather than asking what the NZBoRA requires, their Honours were apparently endeavoured to get the best of both worlds.

Tipping J's approach is the only one capable of accommodating the complexity of s 5 concerns and the desirable wide interpretation of s 14 without contradictions. It displays the same context-specific approach to the determination of limits as employed, for instance, in Canada and South Africa.¹³²⁵ What is more, particularly the wide interpretation s 14 is preferable for the purposes of the new tort. It enables the courts to consider, as Randerson J suggested, the 'wide range of considerations'¹³²⁶ that may occur in these cases. The major problem with Tipping J's approach is the apparent lack of attention paid to it by the courts¹³²⁷ and that it might be too 'Europhone.' The latter issue, however, is more likely to be a result of New Zealand's commitment to the ICCPR, which in turn has many structural similarities with the ECHR.¹³²⁸ It is the result of similar structures regarding the limitation process of enshrined rights that the NZBoRA has to be interpreted similarly to the HRA.¹³²⁹ An intermingled problem is apparently that the flexibility of a stringently applied two-step limitation process requires building a 'culture of justification.'¹³³⁰ New Zealand Judges, in contrast, do not think favourably

¹³²⁵ See P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.11.20; *Hansen v R* [2007] 3 NZLR 1 (SC) para 21 per Elias CJ.

¹³²⁶ *Hosking* [2003] 3 NZLR 385 (HC) para 170.

¹³²⁷ Eg, *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 86 per O'Regan and Panckhurst JJ; see also J F Burrows in Todd (ed), above n , para 18.5.05 at p 763.

¹³²⁸ Particularly s 5 NZBoRA is largely derived from these human rights instruments - see *Ministry of Transport v Noort; Police v Curren* [1992] 3 NZLR 260, 283 per Richardson J

¹³²⁹ See P and A Butler, above n 72, para 13.8.2.

¹³³⁰ P and A Butler, above n 72, para 6.8.1 using a phrase coined by the South African constitutional law professor Etienne Mureinik. For a similar (general) suggestion to the same effect see Lord Steyn, 'Democracy through Law' [2002] *European Human Rights Law Review* 723, 732.

of such an implication.¹³³¹ Part of the aversion might be the awareness of results produced in other jurisdictions. A result accomplished, for instance, in *von Hannover v Germany* may be a warning to those, who do not want take matters that far in this country. However, it might be a cardinal mistake to judge a content neutral legal technique by the results produced, for instance, within the European cultural environment. Authoritative statements from the UK will always display British culture with tones of European values – this results from the fact that this technique requires to establish a culture of justification. Therefore, admonishing voices, who point out that UK cases might provide guidance but should not be blindly followed, must be heard.¹³³² Notwithstanding, if the New Zealand media overall have shown greater responsibility than some of their counterparts in the UK,¹³³³ this would represent a part of New Zealand's cultural environment. Given that this statement is true, a *von Hannover v Germany* scenario may never occur in New Zealand.

The notion of *ad hoc* balancing concept is seductive, 'it fits our usual conceptions and metaphors of justice, fairness, and reasonableness.'¹³³⁴ To my eyes, it is a legal requirement to yield to this temptation in New Zealand – a requirement mandated by the NZBoRA. Currently, the balancing concept of Tipping J is thus preferable. The strengths and weaknesses of both approaches are discussed next.

1.2 The preferable balancing exercise

Having discussed the differences between the approaches in theory, we now turn to the more practical differences. Naturally, there are not many New Zealand authorities concerning the new tort so far.¹³³⁵ However, I have already suggested that Tipping J's approach resembles the corresponding law of the UK whereas the joint judgment largely emulates the US law. Since the English and Welsh law in this area is com-

¹³³¹ P and A Butler, above n 72, para 6.8.3

¹³³² J F Burrows, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389, 397.

¹³³³ A Sims, "'A Shift in the Gravity Centre': The dangers of Protecting Privacy through Breach of Confidence' [2005] *Intellectual Property Quarterly* 27, 36; J F Burrows, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389, 397.

¹³³⁴ T A Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943, 962.

¹³³⁵ J F Burrows, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389, voiced his concern that some decisions have not been reported.

paratively young, it seems advantageous to point very briefly to the German law. This seems necessary to draw a complete picture of the *ad hoc* balancing test. Hence, the experiences of these legal systems will be used for the good of the following analysis. Because this is a very abstract procedure, their pros and cons will be highlighted with the help of a non-fictional example enhanced by fictional elements.

Let us assume that the All Blacks played the Wallabies at Jade Stadium in Christchurch. Players selected for the national rugby team are persons of the highest profile in New Zealand. Rugby is already New Zealand's number-one sport but a match against the cousins from 'over the ditch' is of the utmost public interest/concern.¹³³⁶ The All Blacks steamrolled the Wallabies on their way to victory but one player in the squad unfortunately suffered from 'urinary difficulties.'¹³³⁷ Being caught short, he relieved himself before joining the haka. Notwithstanding the public nature of the venue, the All Black managed to keep the incident secret; just one reporter realised what was happening and quick-wittedly took a photograph.¹³³⁸ A newspaper released an article including information about the rugby match in general and described the misfortune of the player. The article was accompanied by a close-up photography of the kneeling player urinating on the pitch with only his, quite literally, private parts being pixelated.¹³³⁹

Problems of this kind, however, are familiar to sportspersons of this country and elsewhere. The press reports similar incidents from time to time. Its readers, average New Zealanders, are thus well acquainted with this phenomenon. Sailors wetted themselves while being in a 'championship race near Nelson.'¹³⁴⁰ A former All Black was 'often spotted spending a penny [...] during the interval' of rugby matches. Further-

¹³³⁶ See also U J Cheer, 'Privacy and the Public Interest' (2005) 1 *Privacy Law Bulletin* 145, 147 citing *Black v Radio Network Ltd* 1998-003. The BSA held that there is sufficient public interest in the question of who was to be the All Black coach.

¹³³⁷ D McPhail, 'Jerry's excuse a wee bit wet' The Christchurch Press, 15 July 2006 (D8).

¹³³⁸ It will thus be likely that a New Zealand judge would confirm a 'reasonable expectation of privacy.' In reality, the incident was shown briefly on television, see 'What to do when nature calls' <<http://www.rugbyheaven.smh.com.au/articles/2006/07/09/1152383604016.html>> 02 December 2006.

¹³³⁹ The photo accompanied D McPhail's commentary 'Jerry's excuse a wee bit wet' printed in The Christchurch Press, 15 July 2006 (D8).

¹³⁴⁰ All following examples stem from T Smith, 'Collins not the first to be caught short in sport' The Christchurch Press, 15 July 2006 (F2 Sports).

more, a New Zealand cricketer was once ‘suffering as much as the others [from the Indian heat] but he still strode, manfully, in the form of a full-strength run-up as a visceral eruption of Vesuvius proportions struck the bowler’s bowels.’ None of the sports-persons have been offended and protested against media coverage of this kind so far. The present All Black team member is unconcerned about the coverage of the rugby match. However, he is highly embarrassed by the report about his misfortune, especially by the close-up photograph of him passing water. In this respect, he uncompromisingly argues that ‘these nosey parkers should mind their own business.’¹³⁴¹ The All Black cannot understand why this particular incident should be part of the event coverage.

1.2.1 Anticipated solution according to the joint judgment

How might a court adopting the joint judgment’s approach deal with such a case? In accordance with the Restatement of Torts (2nd 1977) their Honours suggested determining matters of public concern as follows:¹³⁴²

[t]he line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled and becomes a morbid and sensational prying into private lives for its own sake with which the *reasonable member of the public* with *decent standards* would say that he had no concern. The limitations, in other words, are those of *common decency* having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public but also due regard to the feelings of the individual and the harm that will be done by the exposure.

The following suggestions aim at both the highly offensive test (defining privacy and/or the necessary level of harm for purposes of the tort) and the public-concern element (defining freedom of expression for the purposes of the tort). As we have seen, there is hardly any direct interaction between privacy and freedom of speech in the joint judgment’s approach. Nevertheless, both tests are based on community mores and involve a form of definitional balancing of the respective interests.¹³⁴³ Hence, their prac-

¹³⁴¹ This element is fictional.

¹³⁴² *Hosking* [2005] 1 NZLR 1 (CA) para 135 per Gault P and Blanchard J (emphasis added).

¹³⁴³ For further details regarding the balancing of interests in liberty and security see above Chapter Two, para 2.5 (highly offensive test); and Chapter Two, para 1.1.3.2. (public-concern element).

tical implications will be dealt with together. The following basic problems have been identified in the USA:¹³⁴⁴

- definitional balancing (and community mores tests) take no account of individual sensibilities; such an approach is more concerned with determining ‘what is’ the law rather than what ‘ought to be’ the law in the respective case;
- in order to avoid judicial second-guessing on ‘matters of public concern,’ judges tend to treat the issue at the highest level of generality;
- apart from individual sensibilities, community mores tests may also efface existing differences within a heterogeneous society;
- these tests also lack a transformative effect, which might be disadvantageous if the behaviour of the press changes from non-prying to prying.

David Anderson has characterised both tests as empiric rather than normative because barely any value choice has to be made by the judge.¹³⁴⁵ Instead, the burden of decision-making is shifting from the judge to the ‘reasonable objective person’ or the ‘reasonable member of the public with decent standards.’¹³⁴⁶ However, empirical tests theoretically try to distil an average result out of a wide range of views. Thus, a judgment would be derived from or verifiable by experience.¹³⁴⁷ Burrows, on the other hand, has pointed out that at least the ‘highly offensive’ test is essentially a matter of *moral* judgment with the inherent difficulty to give detailed reasons for the decision.¹³⁴⁸ In other words, the tests theoretically strive for determining ‘what is’ the law in theory

¹³⁴⁴ See D A Anderson, ‘The failure of American Privacy’ in B S Markesinis (ed), *Protecting Privacy* (1999) 139, 149-51 for further details.

¹³⁴⁵ See D A Anderson, ‘The failure of American Privacy’ in B Markesinis (ed), *Protecting Privacy* (1999) 139, 149.

¹³⁴⁶ See *Shulman v Group W Production Inc*, 18 Cal 4th 200, 225 (1998); P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 137 who points out that the Restatements standard draws upon the ‘factfinder’s perception of community mores.’

¹³⁴⁷ See the explanations of the terms ‘empiric’ and ‘empirical’ in the *Shorter Oxford Dictionary*, (5th ed, 2002) Vol 1.

¹³⁴⁸ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 391, 395.

while Burrows' observation seems to indicate that their practical application rather leads to determinations concerned with what 'ought to be' the law in an individual case.

As for the first aforementioned problem, it is suggested that a New Zealand judge would treat the determination of a matter of public concern on a very general level.¹³⁴⁹ A rugby match involving the All Blacks is clearly such a matter in the sense Gault P and Blanchard J had in mind.¹³⁵⁰ In the USA, judges would find it difficult to distinguish the coverage of the rugby match from the possibly questionable coverage of the particular problem of the All Black player.¹³⁵¹ As a result, they would tend to treat the latter incident as a matter of public concern simply because the rugby match itself is such a matter.¹³⁵² The underlying problem, therefore, is if and how both sets of facts could be distinguished. Likewise, the All Black in our example is complaining about the coverage of his personal misfortune and not about the report of the match itself. Judges in the USA, based on their legal tradition, would tend to believe that the incontinence of the rugby player is related to the main event and therefore a public concern like the main event. Accordingly, the whole article – including the close-up photograph – would be a warranted intrusion of privacy.

It remains to be seen how the New Zealand's courts deal with this test. Recent judgments suggest that the community-mores test as announced in *Hosking* has not taken root. Instead, the courts seem to have adopted the 'logical nexus' requirement of some US courts either explicitly or in a different guise. In *Rogers v TVNZ Ltd*, the plaintiff sought a permanent injunction in order to restrain the defendant from broadcasting an evidential videotape. The videotape depicted the plaintiff confessing to a murder charge, but the evidence was later held inadmissible in court. As a result, the plaintiff was acquitted, but the defendant proposed including parts of the videotape in a

¹³⁴⁹ See also *Duff* [1996] 2 NZLR 89, 99-100 (HC) per Blanchard J.

¹³⁵⁰ It is therefore not just a matter of general interest or mere curiosity - *Hosking* [2005] 1 NZLR 1 (CA) para 134.

¹³⁵¹ The necessity to distinguish between a public interest in an area of activity and a public interest in private information about persons involved in these activities has been pronounced, eg, in *Virgil v Time Inc*, 527 F 2d 1122, 1131 (1975).

¹³⁵² See D A Anderson, 'The failure of American Privacy' in B S Markesinis (ed), *Protecting Privacy* (1999) 139, 151.

programme about the high-profile murder trial. The plaintiff alleged that the proposed broadcast would be an illegitimate interference with his privacy rights.

In a carefully reasoned judgement, the High Court identified a public concern if private information ‘*may add to informed public debate.*’¹³⁵³ The Court found no relevance of the private facts to the matter of public concern was identifiable; the privacy interest of the highly offended plaintiff thus had prevailed.¹³⁵⁴ The Court of Appeal, by contrast, analysed the facts of the case as to where the balance lies.¹³⁵⁵ The Court continued that the Full High Court had missed out in applying a proportionality test and decided the other way around.¹³⁵⁶ This case might therefore be misleading.¹³⁵⁷ Granted that both Courts started by applying the joint judgment’s approach,¹³⁵⁸ the High Court’s decision is arguably correct, because it was unnecessary to apply the proportionality test in this case. However, the proportionality test only follows if the public concern test would have been made out. The High Court made it clear that there was a general public interest in the private information involved, but it was not sufficient to make out the public-concern defence.¹³⁵⁹ There was arguably no need to proceed to the proportionality test. Nonetheless, the advantage of the joint judgment’s approach over US law might be that the consequences of the ‘reasonable person’ and ‘community mores’ tests are eased by an additional, albeit not mandatory, *ad hoc* balancing test. Gault P and Blanchard J stressed that it is part of the juridical function in New Zealand to determine ‘what should or should not be published.’¹³⁶⁰ This would involve a judicial second-guessing of a press editor’s decision.¹³⁶¹

¹³⁵³ *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 71 per Panckhurst and O’Regan JJ; see also J Wilson, ‘Media Law Symposium: Prior Restraint of the Press’ (2006) *New Zealand Law Review* 551, 589

¹³⁵⁴ *Ibid*, para 85.

¹³⁵⁵ *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 85 per Panckhurst and O’Regan JJ.

¹³⁵⁶ *Ibid*, para 86.

¹³⁵⁷ It should be reiterated that expressions on the scope of the tort in *Rogers* may be of questionable nature - *Rogers v TVNZ Ltd* [2007] NZSC 91 para 25 per Elias CJ.

¹³⁵⁸ See for the High Court decision *ibid*, para 18; *ibid*, para 52 for the decision of the Court of Appeal.

¹³⁵⁹ *Rogers v TVNZ Ltd* (2005) 22 CRNZ 668 (HC) para 76 per Venning and Winkelmann JJ.

¹³⁶⁰ *Hosking* [2005] 1 NZLR 1 (CA) para 132.

¹³⁶¹ Although their Honours believed that this is ‘not a matter of Judges being arbiters of taste’ - *ibid*; compare *Andrews v TVNZ High Court Auckland*, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 88 citing *Auckland Area Health Board v TVNZ* [1992] 3 NZLR 406, 407.

*Andrews v Television New Zealand Ltd*¹³⁶² suggests the opposite, however. The similarities of this case with *Shulman v Group W* were obvious. Both cases involved ‘helping professionals;’ they were ‘ride-along reporting’ cases; these cases are named after situations ‘in which media representatives, for the purpose of gathering publishable material, accompany authori[s]ed individuals performing official duties.’¹³⁶³ In a carefully reasoned judgment, Allan J stated that the plaintiffs enjoyed a ‘reasonable expectation of privacy’ in a public place, but the disclosure of personal information was not ‘highly offensive to a reasonable person.’ The Judge nevertheless mentioned that ‘*Shulman* is a useful illustration albeit in a different jurisdiction, of a balancing exercise conducted in the context of a serious road accident case.’¹³⁶⁴ Allan J also referred to a proportionality balancing exercise,¹³⁶⁵ but continued by mentioning that the application of the defence had been illustrated in *Shulman*.¹³⁶⁶ If it had been necessary, his Honour would have upheld what he characterised as the public-concern defence.¹³⁶⁷ In California, as we know, this was a new test, which replaced a balancing exercise based on community mores.¹³⁶⁸ To the best of my knowledge, the decisions following *Hosking* did not enter into any considerations about community mores. This is consequent inasmuch as ‘community mores’ are irrelevant with regard to a ‘logical nexus’ test.¹³⁶⁹ The test can therefore easily be applied by judges without a final determination of newsworthiness by means of a jury verdict. Nevertheless, it may be problematic that the plurality opinion in *Shulman* treated newsworthiness, public interest and public concern as being synonymous.¹³⁷⁰ Furthermore, ‘newsworthiness’ is an element of the tort in California

¹³⁶² High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J).

¹³⁶³ K M Markin, ‘An “Unholy Alliance”: The Law of Media Ride-Alongs’ (2004) 12 *CommLaw Conspectus* 33, 33 fn 4 and p 57.

¹³⁶⁴ *Andrews v TVNZ* High Court Auckland, CIV 2004-404-3536, (unreported, 15 December 2006, Allan J) para 90 (emphasis added).

¹³⁶⁵ *Ibid*, para 84.

¹³⁶⁶ *Ibid*, para 85.

¹³⁶⁷ *Ibid*, para 91.

¹³⁶⁸ See above, Chapter Two, 2.6.2.2.

¹³⁶⁹ D M Worley, ‘Shulman v Group W Productions: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line between Newsworthy Information and Morbid Curiosity’ (1999-2000) 27 *Western State University Law Review* 535, 567.

¹³⁷⁰ G L Bostwick, ‘The Newsworthiness Element: Shulman v Group W Prods., Inc. Muddies the Waters’ (1999) 19 *Loyola of Los Angeles Entertainment Law Review* 225, 237. Compare *Andrews v TVNZ* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) paras 81, 86.

and not a defence.¹³⁷¹ As for the lack of newsworthiness, the plaintiff carries the burden of proof and not the defendant.¹³⁷² A substantial practical difference between the US and the New Zealand law is, in the author's opinion, unlikely to occur under these circumstances. Every prediction is almost necessarily hazardous in this early stage of the tort's development. However, early cases such as *Rogers* suggest that the courts might treat almost everything as 'relevant' to informed public debate as it is common practice in many states of the USA nowadays.¹³⁷³

While applying the add-on proportionality test in *Rogers*, the Court of Appeal weighed the comparatively low 'expectation of privacy'¹³⁷⁴ against a necessarily low public concern.¹³⁷⁵ This reveals an uncertainty about the interest to be put in the privacy side of the proportionality balance.¹³⁷⁶ In the wake of *Hosking*, it remained unclear whether the *level* of offence or the 'reasonable expectation of privacy' should be taken into account in the balance.¹³⁷⁷ In England and Wales, the 'reasonable expectation of privacy' has to be balanced. In English law, however, a 'highly offensive' test is not employed.¹³⁷⁸ Granted that 'it is the offensive publicity which is the gist of the action,'¹³⁷⁹ it is suggested that the Court has to consider the high level of intrusiveness while striking the balance in *Rogers* – and not the low 'expectation of privacy.' If it

¹³⁷¹ *Shulman v Group W Productions Inc*, 18 Cal 4th 200, 214-5 (1998); *Taus v Loftus*, 40 Cal.4th 683, 705 (2007). Compare *Andrews v TVNZ* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 86.

¹³⁷² *Diaz v Oakland Tribune Inc*, 139 Cal App 3d 128-130 (1983); *Shulman v Group W Production Inc*, 18 Cal 4th 200, 215 (1998).

¹³⁷³ P Gewirtz, 'Privacy and Speech' [2001] *Supreme Court Review* 139, 174 observes that it is relatively easy to argue that a private matter is relevant for discussion of public issues; 'if 'relevance' is the sole factor in determining a 'public concern' this might be the engine for destroying privacy.' The same point was made by E Tison, 'Straddling the Fence: Justice Breyer's concurrence in *Bartnicki v Vopper* gives Protection of Privacy and still Manages to Protect the Press: *Bartnicki v Vopper*, 532 US 514 (2001)' (2003) 27 *Southern Illinois University Law Journal* 661, 682. See also *Andrews v TVNZ* High Court Auckland, CIV 2004-404-3536, (unreported, 15 December 2006, Allan J) para 92.

¹³⁷⁴ This feature of the tort will be discussed later in greater detail.

¹³⁷⁵ *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) paras 59, 71 per Panckhurst and O'Regan JJ; see also U J Cheer, 'The Future of Privacy – Recent Legal Developments in New Zealand' (2007) 13 *Canterbury Law Review* 169, 186.

¹³⁷⁶ See also *Andrews v TVNZ Ltd* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 84.

¹³⁷⁷ See A Geddis, 'Hosking v Runtig: A Privacy Tort for New Zealand' (2005) 13 *Tort Law Review* 5, 8-9.

¹³⁷⁸ J F Burrows, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389, 394.

¹³⁷⁹ *Ibid*, at p 395. See also P J Mc Nulty, 'The Public Disclosure of Private Facts: There is Life after Florida Star' (2001) 50 *Drake Law Review* 93, 104.

were otherwise, the ‘burden faced by the plaintiff [would be] a high one’¹³⁸⁰ (whatever that may mean), but discharging this burden would not promise any advantage in the balance. This might seem arbitrary to some. As already indicated, it is all too soon for a prognosis, but this might suggest that the New Zealand courts show the same habit as their US colleagues.¹³⁸¹ Generally, the discussion about the place and appropriate contours of the public interest element has barely begun in New Zealand.¹³⁸²

As to the second aforementioned problem, Anderson observes that definitional balancing generally considers the context of each individual case insufficiently while the gravity of privacy interests is highly context dependant. This statement aims predominantly at the ‘highly offensive’ test of the tort. The ‘reasonable person’ applied in our example may suggest that reasonable New Zealanders are familiar with cricketers, sailors and rugby players having urinary problems while performing their sport. This objective reasonable person could therefore be familiar with media coverage of this kind. The fact that particularly a former All Black player was regularly showing a similar habit might suggest that it could not be regarded as ‘highly offensive’ in the case of the All Black player in our example. This overlooks the context of both cases. The former All Black player might have been very extrovert and did not even care about media coverage of this kind. The current All Black player, however, was highly embarrassed by this incident. To put it plainly, the application of the ‘reasonable person’ test is at least vulnerable to testing the current All Black’s sensibilities on the sensibilities of his predecessors. The context of the particular case of the plaintiff is likely to be ignored. Judges in the USA would almost automatically think that ‘this has been reported several times before, it could therefore be no actionable invasion of privacy in the present case.’¹³⁸³ Anderson observes that this empirical approach is likely to enter into a vicious circle because the more privacy has been consumed by the public in the past, the

¹³⁸⁰ *Andrews v TVNZ Ltd* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 49.

¹³⁸¹ It should be noted, however, that the prior restraint context was decisive in this case - U J Cheer, ‘The Future of Privacy – Recent Legal Developments in New Zealand’ (2007) 13 *Canterbury Law Review* 169, 186.

¹³⁸² *Ibid*, at p 187.

¹³⁸³ D Anderson, ‘The failure of American Privacy’ in B Markesinis (ed), *Protecting Privacy* (1999) 139, 150.

less privacy is protected in the present case.¹³⁸⁴ Additionally, people who voluntarily expose their privacy, for instance, in reality TV or talk shows could influence the reasonable person as well.¹³⁸⁵ ‘Community mores’ and the standard of the ‘ordinary reasonable person’ are built through the experiences of others.¹³⁸⁶ The law protects *what is*, not what *ought to be* and consequently protects privacy only to the customarily respected extent.¹³⁸⁷ Seen from the perspective of the media, ‘the capacity of the news to make persons and events public would be completely subordinated to the [community mores] enforced.’¹³⁸⁸ In short, the test may be disadvantageous for both litigants.

In my view, the law should always show the potential to have a transformative effect in addition to serving justice in the individual case. The conception of the joint judgment is likely to serve none of these purposes.¹³⁸⁹ Firstly, these tests do not protect the individual plaintiff and they do not promote individual justice. The concept rather calls for assimilation of the individual into the majority of ‘reasonable people’ or an alignment with the ‘community mores.’ This is an unpalatable determination of an individual right, at least from the point of view of a European. Secondly, a transformative effect is hardly identifiable; the concept rather administers the status quo, because it merely reproduces the average stance of society members.¹³⁹⁰ Apart from the add-on proportionality test, no normative value judgment takes place in two decisive prerequisites of the tort. This concept does not decide whether an individual should conceal certain information from the world; it is at least very vulnerable to decide, ‘that contemporary culture does not consistently condemn such disclosures.’¹³⁹¹ Moreover, this contemporary culture is not influenced by normative decisions of the courts but – with a bit

¹³⁸⁴ Ibid (Anderson describes this approach as ‘self-defeating’ or ‘self-eroding’).

¹³⁸⁵ See, eg, *Doe v Methodist Hospital*, 690 NE 2d 681, 692 (1997) (‘In our “been there, done that” age of talk shows, tabloids, and twelve-step programs, public disclosures of private facts are far less likely to cause shock, offen[c]e, or emotional distress than at the time Warren and Brandeis wrote their famous article’).

¹³⁸⁶ D Anderson, ‘The failure of American Privacy’ in B Markesinis (ed), *Protecting Privacy* (1999) 139, 150.

¹³⁸⁷ Ibid, at p 149.

¹³⁸⁸ R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 1005.

¹³⁸⁹ It seems, however, that this is not feasible in court decisions purely based on common law.

¹³⁹⁰ A similar point was made, albeit in a different context, in *Brooker v Police* [2007] 3 NZLR 91 para 112 per McGrath J.

¹³⁹¹ D A Anderson, ‘The failure of American Privacy’ in B Markesinis (ed), *Protecting Privacy* (1999) 139, 150.

of exaggeration – by reality TV and talk shows.¹³⁹² The author acknowledges that it is precisely the purpose of the common law, as inspired by the rules of precedent and the stare decisis doctrine, to reproduce ‘what is’ as distinct from deciding what ‘ought to be.’ The growing exposure of individual lives to the public gaze, consensual or not, is nevertheless a global phenomenon.¹³⁹³ The status quo of a non-prying press might therefore change in New Zealand, but these tests are insufficient to take legal counter-measures if that is desired.

Finally, ‘community mores’ and ‘reasonable person’ tests are based on the assumption that a homogeneous society exists. In a heterogeneous society, by contrast, this ideal person is pure fiction and its application may be appropriate under certain circumstances but inappropriate in others. In the present context, the latter seems to be the case as will be detailed below. For the situation in the USA, it has been observed that community norms regarding privacy will differ ‘among communities, between generations, and among ethnic, religious, or other social groups, as well as among individuals.’¹³⁹⁴ The situation in New Zealand does not seem to be entirely different.¹³⁹⁵ The ethnic diversity, for instance, is growing in this country.¹³⁹⁶ In a heterogeneous society, the common law can become an instrument for effacing cultural differences by applying such standards.¹³⁹⁷ These abstract tests therefore not only diminish differences between individuals, even characteristics of ethnic minorities or other social groups may be effaced.¹³⁹⁸ The immanent effect of this abstract standard is apparently desired in the

¹³⁹² See, eg, P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 170 for a more detailed elaboration on the ‘Oprahfication’ of American culture; S B Spencer, ‘Reasonable Expectations and the Erosion of Privacy’ (2002) 39 *San Diego Law Review* 843, 873.

¹³⁹³ M Richardson, ‘Privacy and Precedent: The Court of Appeal’s Decision in *Hosking v Runting*’ (2005) 11 *New Zealand Business Law Quarterly* 82, 94.

¹³⁹⁴ R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 975-6; see also R Wacks in R Wacks (ed), *Privacy Volume I* (International Library of Essays in Law & Legal Theory) (1993), xvi – Introduction.

¹³⁹⁵ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 395.

¹³⁹⁶ According to Statistics New Zealand – Tatauranga Aotearoa, <<http://www.stats.govt.nz/analytical-reports/children-in-nz/growing-ethnic-diversity.htm>> 03 December 2006. From 1983 to 1996, the number of European children fell from 72.7 to 62.4 percent. Over the same period, the proportion of Maori (from 20.0 to 24.5 percent), Pacific Islanders (from 5.6 to 7.6 percent) and Asian (from 1.7 to 5 percent) children increased.

¹³⁹⁷ R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 977.

¹³⁹⁸ The consequences will receive further attention below during the discussion of ‘highly offensive’ test.

USA.¹³⁹⁹ In New Zealand, in contrast, this effect might be smoothened by a proper selection of judges.¹⁴⁰⁰

1.2.2 Anticipated solution according to Tipping J

The anticipated solution by means of applying an *ad hoc* balancing exercise will be analysed next. Such a balancing test, as championed by Tipping J, is not prone to being submerged into abstractions like ‘ordinary reasonable person’ or ‘community mores.’ The application of the test is based on the assumption that ‘balancing is best done on the facts of each case’ in order to determine whether the particular interference with privacy ‘is so serious as to warrant overriding freedom of expression.’¹⁴⁰¹

Some argue that it is nonetheless difficult to examine Tipping J’s approach properly, because it seemed ‘churlish to demand a greater specificity with regards to this value exercise.’¹⁴⁰² In the context of the appropriate impact of the NZBoRA on the common law, Geddis mused that Tipping J’s approach is simply amounting to a ‘call for the courts to pay heed to “the vibe”.’¹⁴⁰³ This is a remarkably apt criticism. To catch ‘the vibe’ in the light of the facts of the case lies at the heart of a proportionality test. On occasion, the appropriate ‘shade of grey’ between two stark opposites (the prevailing of either privacy or freedom of expression) has to be identified. This balancing exercise may therefore be characterised as being ‘the mark of a reasonable, rational, subtle mind.’¹⁴⁰⁴ In practice, however, the application of this technique demands a lot of sub-

¹³⁹⁹ See P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 138 (2001) (‘Just as the constitutional protection accorded literary, artistic, scientific, and political speech should not differ from community to community, neither should the public’s right to know depend on the sensibilities of particular communities’); see also J Lenow, ‘First Amendment Protection for the Publication of Private Information’ (2007) 60 *Vanderbilt Law Review* 235, 256, who argues that the ambit of free speech would be determined by prevalent cultural sensibilities if human emotion restricts free speech.

¹⁴⁰⁰ One of the qualities a candidate must show in this country is that she is ‘aware of, and sensitive to, the diversity of modern New Zealand society’ – ‘Appointing Judges: A Judicial Appointments commission for New Zealand – Appendix One: New Zealand Appointments’ <<http://www.justice.govt.nz/pubs/reports/2004/judicial-appointment/appendixone.html>> 03 December 2006.

¹⁴⁰¹ *Duff* [1996] 2 NZLR 89, 99 (HC) per Blanchard J.

¹⁴⁰² A Geddis, ‘The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*’ [2004] *New Zealand Law Review* 681, 701.

¹⁴⁰³ *Ibid*; see also K M Lewin, ‘The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany’ (1968) 17(3) *International Comparative Law Quarterly* 571, 599.

¹⁴⁰⁴ T A Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 943, 962.

tlety from the judge.¹⁴⁰⁵ Every relevant fact of the case has to be weighed in the balance.¹⁴⁰⁶ With regard to the German law, it has been observed that the result of such a weighing exercise is therefore often unpredictable.¹⁴⁰⁷ This was also well reflected in *Campbell*. The Law Lords were not in dispute as to whether a proportionality test as a method has to be applied.¹⁴⁰⁸ The primary issue was how the balance had to be struck between arts 8 and 10 ECHR while applying this method.¹⁴⁰⁹ Each right has to be limited no more than necessary. The majority, therefore, held that the press justifiably published two sets of facts whilst the publication of three sets amounted to an unwarranted interference with privacy.¹⁴¹⁰ For the majority, this result represented the maximal optimisation of both rights – the appropriate ‘shade of grey’ in that particular case. The media defendant was allowed to publish the story but the plaintiff was granted a right to conceal certain parts of the information from the world. The minority, as we know, was less subtle and regarded the publication of the whole article as justified (on an identical factual basis).¹⁴¹¹ The calculability of the law is impaired by applying a proportionality test.¹⁴¹² This can contribute to an overall uncertainty that is undesirable for both litigants and the law in general.¹⁴¹³

In my view, the recognition of the full context required by a proportionality-balancing test makes it difficult to develop the privacy tort on a case-by-case basis in the traditional sense. The term ‘case by case’ may easily conceal that the cases could rather be seen as a stringing together of individual judgments with, if any, a very slow

¹⁴⁰⁵ See B S Markesinis and S Enchelmaier, ‘Human Rights under German Constitutional Law’ in B S Markesinis (ed), *Protecting Privacy* (1999) 191, 238.

¹⁴⁰⁶ See, eg, the judgment of the German Federal Constitutional Court BVerfGE 93, 266, 296 (1995) (“Soldiers are Murderers II”) regarding the weighing exercise in defamation.

¹⁴⁰⁷ Ibid; the same has been predicted earlier by the US Supreme Court – see *Gertz v Welch*, 418 US 323, 343 (1974).

¹⁴⁰⁸ [2004] 2 All ER 995 (HL) para 36 per Lord Hoffmann.

¹⁴⁰⁹ Ibid, para 126 per Lady Hale.

¹⁴¹⁰ See also *Browne* [2007] 3 WLR 289 (CA) para 38 per Sir Anthony Clarke MR. The English Courts do not merely distinguish particular sets of facts, the individual items also have to be balanced separately by applying the proportionality test – *McKennitt* [2006] EMLR 178 (QB) para 67 Eady J; [2007] 3 WLR 194 (CA) para 47 per Buxton LJ.

¹⁴¹¹ *Campbell* [2004] 2 All ER 995 para 32 per Lord Nicholls; para 78 per Lord Hoffmann.

¹⁴¹² See H Stoll, ‘General Right to Personality in German Law’ in B S Markesinis (ed), *Protecting Privacy* (1999) 29, 42; K M Lewin, ‘The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany’ (1968) 17(3) *International Comparative Law Quarterly* 571, 599.

¹⁴¹³ See B S Markesinis and S Enchelmaier ‘Human Rights under German Constitutional Law’ in B S Markesinis (ed), *Protecting Privacy* (1999) 191, 238. See also *CC v AB* [2007] EMLR 11 (QBD) para 27 per Eady J.

or limited organic development. For the proportionality test in Germany, it has been observed that ‘not a few cases abound with noble words and impressive ethics but [they] do not provide a clear directive to be followed in other cases.’¹⁴¹⁴ The proportionality test is undoubtedly compatible with the NZBoRA. However, it is to some degree incompatible with the common law, at least as far as the incremental development on a case-by-case basis is concerned. Moreover, an application of this test *de lege artis* is time consuming. It is my personal observation that particularly the lower German courts are often asked too much, presumably because of their high workload.¹⁴¹⁵ The theoretical structure of the proportionality balance is in the practice of these courts sometimes hardly recognisable. The balancing exercise then appears to take place inside a ‘black box’ with little discussion of the valuation standards.¹⁴¹⁶ In sum, all is therefore very well on paper, but difficult to apply in practice.

After all, the most striking advantage of the joint judgment’s solution reveals the exposed flank of Tipping J’s approach. The joint judgment largely fades out the context. This concept, influenced by the US law, strives ‘for as much *predictability* as possible within [that country’s] system of case-by-case adjudication, lest [the courts] unwittingly chill First Amendment freedoms.’¹⁴¹⁷ The decisions must be capable of generating rules of precedent to constrain future judicial decisions.¹⁴¹⁸ Particularly with regard to the advantages of the US approach, it must be stressed that this premise will be met easier by adopting the standards of that country.

The application of an *ad hoc* balancing test, by contrast, is more likely to produce individual justice. Because both principles have to be optimised to the greatest ex-

¹⁴¹⁴ H Stoll, ‘General Right to Personality in German Law’ in B S Markesinis (ed), *Protecting Privacy* (1999) 29, 42; E Barendt, ‘Privacy and freedom of speech’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 11, 21 and T A Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 943, 949.

¹⁴¹⁵ The reason for this phenomenon is that *ad hoc* balancing stems originally from constitutional law. The workload of specialised constitutional courts, however, is often much lower than for judges of the ordinary jurisdiction – see B S Markesinis and S Enchelmaier in B S Markesinis (ed), *Protecting Privacy* (1999) 191, 238 for further details.

¹⁴¹⁶ T A Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 943, 976.

¹⁴¹⁷ *Briscoe v Reader's Digest Association Inc*, 93 Cal Rptr 866, 876 fn 18 (1971).

¹⁴¹⁸ R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 975; see also P J Mc Nulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 103.

tent possible, three sets of facts have to be distinguished in our initial All Black example: (1) the coverage of the rugby match, (2) the coverage of the personal incident involving the All Black in written form and (3) the marginally pixelated close-up photograph of the player kneeling on the pitch.¹⁴¹⁹ English authorities suggest that the first two sets of facts can be published. The photograph, however, would be regarded as exceedingly intrusive if balanced against the public interest in learning about the information. The appropriate ‘shade of grey’ would therefore be that the publication of the third set of facts is unwarranted.

Although a normative value judgment is required, a general transformative effect for the public is, at least in the short run, minimal. Each decision is highly context-dependent, often without clear directives for following cases. An effect nonetheless occurs after a passage of time when those subject to the law develop a sense of ‘catching the vibe’ regarding what is appropriate to publish and what is not. What develops is called ‘self-censorship,’ which in turn leads to a ‘chilling effect on freedom of speech’ in some jurisdictions. In other legal systems, the same phenomenon is described as a manifestation of a ‘culture of justification’ – the eye of the beholder decides once more. For some Europeans, for instance, it is a cultural achievement that media and citizens alike sometimes ask themselves ‘can I say that?’ or ‘can I publish this’ with regard to rights of others before they actually do it – a responsible or reasonable handling of free speech rights is required. However, Markesinis observes that, for instance, German law has ‘managed to accord speech rights protection levels similar to those found in the United States while also protecting personality and privacy in a way that American law has not managed to do.’¹⁴²⁰

Some might regard the ‘chilling effect’ argument against an *ad hoc* balancing test, thus, as overrated. It is only powerful in connection with the media’s role of a public watchdog and protector of democracy.¹⁴²¹ Democratic self-governance requires a

¹⁴¹⁹ See also *McKennitt* [2006] EMLR 178 (QB) para 11 per Eady J. The Court identified five categories of information, which the claimant sought to restrain.

¹⁴²⁰ B S Markesinis and S Enchelmaier, ‘Human Rights under German Constitutional Law’ in B Markesinis (ed), *Protecting Privacy* (1999) 191, 242.

¹⁴²¹ D J Solove, ‘The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure’ (2003) 53 *Duke Law Journal* 967, 1029 (2003). See also *von Hannover v Germany* (2005) 40 EHRR 1

free flow of (at least) truthful information in order to debate the merits of a given policy – the public is otherwise not able to exert the influence necessary to achieve the desired results.¹⁴²² However, to assume, in contrast, that this concern can be sensibly invoked by publishing a close-up photograph of a urinating rugby player, as in our example, or divulge the name of a rape victim¹⁴²³ seems quite daring.

A proportionality test pays tribute to the pluralism of interests and values in a modern society rather than focusing on a single value. It is a truism that one citizen's right is always the flipside of a fellow citizen's right.¹⁴²⁴ Furthermore, privacy is widely regarded as 'constitutive' of society, which means that privacy harms done to individuals might affect society as a whole, because it deters other individuals from activities contributing to a greater social good.¹⁴²⁵ A 'chilling effect' might occur no matter what. The question to be posed is whether the latter effect is of importance to a society and, thus, identified as a problem in the first place.

It should be noted, in conclusion, that Tipping J's approach - and the *ad hoc* balancing test generally - is far from being flawless. The observation of Aleinikoff remains nonetheless true for the situation in Germany: '[t]he attractiveness of balancing went beyond its practical utility.'¹⁴²⁶ Notwithstanding, the concept is capable of accomplishing more goals than the one advocated by the joint judgment. One might be

para 63; *McKennitt* [2006] EMLR 178 (QB) para 55 per Eady J; [2007] 3 WLR 194 (CA) para 12 per Buxton LJ; M Markin, 'An "Unholy Alliance": The Law of Media Ride-Alongs' (2004) 12 *CommLaw Conspectus* 33, 35; P Gewirtz, 'Privacy and Speech' [2001] *Supreme Court Review* 139, 172.

¹⁴²² J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 239.

¹⁴²³ But see *Florida Star v B G F*, 491 US 524 (1989).

¹⁴²⁴ W Brugger, 'The Image of the Person in the Human Rights Concept' (1996) 18(3) *Human Rights Quarterly* 594, 603.

¹⁴²⁵ D J Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 488 (2006). This argument had also been elaborated in *Bartnicki v Vopper*, 532 US 514, 557 per Rehnquist J (dissenting). See also P Gewirtz, 'Privacy and Speech' [2001] *Supreme Court Review* 139, 165; R Kilkenney, 'Invasion of Privacy for the Greater Good: Why *Bartnicki v Vopper* Disserves the Right of Privacy and the First Amendment' (2003) 64 *Ohio State Law Journal* 999, 1002; D Mead, 'It's a Funny Old Game - Privacy, Football and the Public Interest' [2006] *European Human Rights Law Review* 541, 546-47; K M. Beasley, 'Up-Skirt and other Dirt: Why Cell Phone Cameras and other Technologies Require a New Approach to Protecting Personal Privacy in Public Places' (2006) 31 *Southern Illinois University Law Journal* 69, 92.

¹⁴²⁶ T A Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943, 961; compare B S Markesinis and S Enchelmaier, 'Human Rights under German Constitutional Law' in B S Markesinis (ed), *Protecting Privacy* (1999) 191, 240.

tempted to say that the charm of a law, whose foremost purpose is to be predictable with regard to just one societal interest, is quite austere. The lacklustre performance of the US tort is only in part a result of the influence of the First Amendment. Additionally, reasonable person and community mores tests inherently promote that freedom of speech prevails. The systemic value of speech is emphasised on both occasions whereas the individual's conflicting interest in maintaining privacy is seen as 'episodic' or 'atomistic' rather than systemic. Even progressive formulations of the public interest only led to a small number of successful privacy actions in the USA.¹⁴²⁷ I suggest that it might be wishful thinking to believe that New Zealand judges will not fall into the same pitfall as their counterparts in the US.¹⁴²⁸ I use the term 'wishful' deliberately, because the adoption of these tests inherently lead to the results achieved in that country.

Whether the respective approach of Tipping J and the joint judgment accomplish the same result, thus, depends on the subtlety of the judge deciding the case. For the individual plaintiff, however, it represents a significant difference whether or not such a close-up photograph is published by the media. Legal restrictions on such disclosures are more likely to be achieved by applying a proportionality test. Having decided that Tipping J's approach is preferable, it is of further interest whether the proportionality test should be characterised as a defence or an element of the action. This problem will receive further attention in the following.

1.3 The public- concern element – defence or element of the tort?

The characterisation of the 'public concern' feature is a problem of predominantly academic nature for reasons suggested below. This feature of the tort recognises the guarantee of freedom of expression.¹⁴²⁹ The High Court categorised it in *P v D*¹⁴³⁰ as one of the four factors of the tort.¹⁴³¹ The majority in *Hosking*, however, character-

¹⁴²⁷ P J Mc Nulty, 'The Public Disclosure of Private Facts: There is Life after Florida Star' (2001) 50 Drake Law Review 93, 109.

¹⁴²⁸ The joint judgment explicitly pointed out that American cases would have to be treated with caution - *Hosking* [2005] 1 NZLR 1 (CA) para 76 per Gault P and Blanchard J.

¹⁴²⁹ See J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.05 at 762.

¹⁴³⁰ *P v D* [2000] 2 NZLR 591 paras 34, 35.

¹⁴³¹ See also *Graham v Central Pacific Finance Ltd* [2001] DCR 513 para 15; *L v G* [2002] NZAR 495, 506 (DC).

ised it as a defence.¹⁴³² The joint judgment pointed to supposed parallels between the new privacy tort and the equitable remedy of breach of confidence,¹⁴³³ in which the feature had been established as the iniquity defence.¹⁴³⁴ The legal rationale behind the defence is that there is no confidence regarding the disclosure of an iniquity.¹⁴³⁵ According to Burrows, it would be anomalous if the nature of the feature were otherwise in invasion of privacy.¹⁴³⁶

A related issue of more practical relevance is concerned with the onus of proof. In Californian common law, for instance, the newsworthiness test is part of the cause of action; the plaintiff has to discharge the burden of proof, viz, he or she has to show a lack of newsworthiness.¹⁴³⁷ On a more general level, the ‘newsworthiness’ element is either a defence, an element of the tort or a constitutional privilege depending on the jurisdiction where the claim is filed.¹⁴³⁸ As for New Zealand, it has been argued that the ‘public concern’ feature, categorised as an element of the tort, would inconveniently leave the plaintiff with the onus of proving this point.¹⁴³⁹ Instead, it has been suggested that it should be for the defendant to provide evidence of the concern.¹⁴⁴⁰ This overall concept has been met with approval by scholars¹⁴⁴¹ and the courts¹⁴⁴² later shared this view.

¹⁴³² *Hosking* [2005] 1 NZLR 1 (CA) para 129 per Gault P and Blanchard J; para 257 per Tipping J.

¹⁴³³ K Evans, ‘Was Privacy the Winner on the Day?’ [2004] *New Zealand Law Journal* 181, 182.

¹⁴³⁴ *Ibid*, para 129.

¹⁴³⁵ An iniquity was first exclusively related to fraudulent behaviour of the plaintiff but was later extended to information of public interest - *Initial Services Ltd v Putterill* [1968] 1 QB 396, 405 per Lord Denning MR. ‘Iniquity’ later became an instance of just cause for breaking confidence – *Lion Laboratories Ltd v Evans* [1985] QB 526, 537-8 per Lord Stephenson; see also U J Cheer, ‘Privacy and the Public Interest’ (2005) 1 *Privacy Law Bulletin* 145, 148.

¹⁴³⁶ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.05 at 762.

¹⁴³⁷ *Diaz v Oakland Tribune Inc*, 139 Cal App 3d 128-130 (1983); *Taus v Loftus*, 40 Cal 4th 683, 717 (2007). See too G L Bostwick, ‘The Newsworthiness Element: *Shulman v Group W Prods., Inc.* Muddies the Waters’ (1999) 19 *Loyola of Los Angeles Entertainment Law Review* 225, 228, 236.

¹⁴³⁸ D M Worley, ‘*Shulman v Group W Productions*: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity’ (1999-2000) 27 *Western State University Law Review* 535, 551; see also S M Scott, ‘The Hidden First Amendment Values of Privacy’ (1996) 71 *Washington Law Review* 683, 701.

¹⁴³⁹ K Evans, ‘Was Privacy the Winner of the Day?’ [2004] *New Zealand Law Journal* 181, 184.

¹⁴⁴⁰ U J Cheer, ‘Privacy and the Public Interest’ (2005) 1 *Privacy Law Bulletin* 145, 146; *Rogers v TVNZ Ltd* (2005) 22 CRNZ 668 (HC) para 21 per Venning and Winkelmann JJ; *Brown v Attorney-General* [2006] DCR 630 para 84 per Spear J.

¹⁴⁴¹ K Evans, ‘Was Privacy the Winner of the Day?’ [2004] *New Zealand Law Journal* 181, 184; U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 254; J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.05 at 762; R Tobin, ‘Invasion of Privacy’ [2000] *New Zealand Law Journal* 216, 218.

Subsequently, I seek to show that these observations face two problems. First, it is obvious that a common law analogy is the decisive factor in determining the nature of the public-concern element. The present writer has argued before that it is the impact of the NZBoRA, which has to be considered in this context. It will thus be analysed how the feature would be categorised according to the Act. Secondly, the current concept is inspired by the traditional breach of confidence doctrine, which requires the existence of a relationship of confidence. The new privacy tort, on the other hand, omits such a requirement and the conceptual structure of the action might hence be different.¹⁴⁴³ Moreover, the current starting point seems to overlook that the qualification of the public concern feature may change when personal information is protected under what has become known as the extended breach of confidence action.¹⁴⁴⁴ As we know, there are now two distinct branches of breach of confidence in English law.¹⁴⁴⁵

1.3.1 The NZBoRA and public interest feature of the privacy tort

Any attempt to conceal private information from the public gaze is bound to clash with freedom of speech.¹⁴⁴⁶ Consequently, one could ask whether it is conceptually sound to recognise a *guarantee* by offering the defendant the possibility to defend herself with freedom of expression. To do so would seem inconsequential to my mind.¹⁴⁴⁷ The recognition of a guarantee might imply that the courts have to consider freedom of speech in every case without an additional act of will. Furthermore, freedom of speech

¹⁴⁴² *Rogers v TVNZ Ltd* [2007] NZSC 91 para 98 per McGrath J; *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 69 per Panckhurst and O'Regan JJ; *Andrews v TVNZ Ltd* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 80.

¹⁴⁴³ *Douglas v Hello! Ltd* [2001] 2 All ER 289 para 126 per Sedley LJ ('What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to unwanted intrusion into their private lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy'); see also J Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62(2) *Cambridge Law Journal* 444, 451.

¹⁴⁴⁴ See *Hosking* [2005] 1 NZLR 1 (CA) para 42 per Gault P and Blanchard J.

¹⁴⁴⁵ *Douglas v Hello! Ltd (No 3)* [2007] 2 WLR 920 (HL) para 255 per Lord Nicholls.

¹⁴⁴⁶ U J Cheer, 'The Future of Privacy – Recent Legal Developments in New Zealand' (2007) 13 *Canterbury Law Review* 169, 187.

¹⁴⁴⁷ It seems widely expected that the new tort has to fit alongside the requirements of the NZBoRA – see K Evans, 'Reverse gear for NZ's privacy tort: the Hosking decision' Privacy Law and Policy Reporter <<http://www.austlii.edu.au/journals/PLPR/2003/35.html>> 29 May 2006; see also J F Burrows, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389, 396 ('In all cases involving privacy the right of freedom of expression must be brought into the balance').

has, as we know, an additional dimension transcending the interests of the parties involved – the freedom of the public to be informed about truthful matters of public interest.¹⁴⁴⁸

Given that the role of ss 5 and 14 has to be considered in each individual disclosure case, it does not seem conceptually sound that it is necessary to raise a defence. A defence that is inevitably to be invoked in every case is de facto an element of the tort. However, it may be verging on the trite to say that a defence could be raised, but it must not. Since one has to make up the infamous ‘overpaid but underachieving lawyer X’ for the distinction to take effect, it remains predominantly an academic problem. It is highly unlikely to happen in practice that counsel ‘forgets’ to raise the defence. For the sake of doctrinal purity, the public concern feature should nonetheless be regarded as an element of the tort. If it were otherwise, it occasionally might be difficult to identify the recognition of the guarantee at interlocutory stage. An ex-parte injunction such as *Brash v Jane and John Doe*¹⁴⁴⁹ is an illustrative example, because the unknown defendants were naturally not able to raise the defence.

Likewise, the situation in the England and Wales prior to the enactment of the HRA, the characterisation of the public concern as a defence seems to be predominantly influenced by the necessity to place the onus of proof for showing the public interest on the defendant.¹⁴⁵⁰ How would an approach influenced by the NZBoRA handle this problem?¹⁴⁵¹ At the outset, I should like to reiterate that I presuppose a bifurcated approach to the limitation of human or constitutional rights. The first step consists in determining whether the scope of the right has been infringed; if this question could be

¹⁴⁴⁸ See also *Duff* [1996] 2 NZLR 89, 101 per Blanchard J (emphasis added).

¹⁴⁴⁹ HC Wellington, CIV-2006-485-2605 (unreported, 16 November 2006 MacKenzie J). Former National Party leader Dr Brash was granted an injunction, because he did not want his private email correspondence broadcast to the world. Without going into too much detail, the suppressed email correspondence was likely to include matters of considerable public interest. It has to be noted that Mackenzie J apparently relied on Mr Brash’s argument that publication of the emails would have been a breach of copyright. According to his Honour, a breach of copyright would normally prevail over freedom of speech – see ‘Brash case rings alarm bells for media’ <<http://www.stuff.co.nz/stuff/print/0,1478,3866249a6160,00.html> at 24 November 2006>. An absent defendant, however, cannot possibly raise the defence that the emails are not protected by copyright.

¹⁴⁵⁰ See R Wacks, *Privacy and Press Freedom* (1995) 110.

¹⁴⁵¹ M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 579.

answered in the affirmative, a *prima facie* violation of the right has occurred.¹⁴⁵² The focus, then, shifts to the question whether the infringement can be justified under a limitation clause such as art 10 (2) ECHR or s 5 NZBoRA; this stage consists in determining whether a definitive violation of the right has occurred subject to a proportionality balancing test.¹⁴⁵³ We approach this problem by initially asking how the system operates in the public law sphere (vertical dimension of the right) before I seek to extract the implications for a constitutionalised common law tort (horizontal application).

In the context of public law, the plaintiff has to establish that she has experienced an interference with her affirmed right (for instance, an interference with the scope of s 14).¹⁴⁵⁴ As for the second stage, the burden of proof shifts to the state. The respective branch of government has to justify the interference pursuant to s 5.¹⁴⁵⁵ This concept follows the ‘she who alleges bears the burden of proving’ principle.¹⁴⁵⁶ The citizen, in the role of the plaintiff, is thereby defending her liberty (ie, her affirmed right). The state, as defendant, has to establish sufficient justification as to why an interference with the citizen’s right constitutes a reasonable limit demonstrably justified in a democratic society. In other words, the state has to establish that the infringement of the right does not amount to a violation of the right because the infringement is sufficiently justified.

Let us now try to distil implications for the common law sphere. I suggest that this concept can be applied horizontally with just one logic alteration; that is to say that the roles of the parties change in accordance with their inversed interests in a private law dispute.¹⁴⁵⁷ The private law scheme, as it were, has to be the negative of the public

¹⁴⁵² M Kumm, ‘What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement’ at p 5 <<http://www.lsr.nelco.org/nyu/plltwp/papers/46> at 08 February 2008>.

¹⁴⁵³ Ibid.

¹⁴⁵⁴ P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 174; P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 6.6.5.

¹⁴⁵⁵ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), 6.6.5; P Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003) 174.

¹⁴⁵⁶ Ibid; see also *Ministry of Transport v Noort; Police v Curren* [1992] 3 NZLR 260, 283 (CA) per Richardson J (‘[...] the onus is on those relying on s 5 to show that the limit is reasonable and can be demonstrably justified in a free and democratic society’).

¹⁴⁵⁷ Freedom of speech is the only NZBoRA right in play. The plaintiff has to argue that her privacy interest overrides any public interest in learning about her personal information. It is the defendant in this

law scheme. In the context of private law, the plaintiff seeks to restrict an enshrined right whilst the defendant is trying to uphold her interests in freedom of speech. Therefore, it would be theoretically for the plaintiff to argue that an interference with the value of s 14 did *not* occur. However, since it has been suggested that s 14 has been eloquently interpreted as being ‘as wide as human thought and imagination,’ there will be an interference with the principle in probably every situation imaginable. The burden of proof almost automatically shifts to the defendant, who in turn has to establish that the infringement of her right to freedom of expression is *not*¹⁴⁵⁸ justified pursuant to s 5. In brief, the defendant has to establish that a violation of her right has occurred. This has to be carried out by showing that the public interest in receiving the personal information is sufficient to outweigh the privacy interest in the balance. The scheme from the public law remains nonetheless substantially the same for the purposes of the private law. Particularly the ‘she who alleges bears the burden of proving’ principle applies equally. Moreover, such a theoretical scheme of argumentation is apparently not unfamiliar in practice.¹⁴⁵⁹

As a result, an ex-parte injunction against ‘Jane and John Doe’ would consequently be either impossible (due to the necessary participation of the defendant) or require the plaintiff to show that the publication is not justified (because of the fact that the ‘public interest’ feature is an element of the tort and not just a defence).¹⁴⁶⁰ It seems reasonable to suggest, in conclusion, that a public-concern element influenced by horizontally applied quasi-constitutional rights should be categorised as an element of the tort. By adopting the modified burden-of-proof scheme derived from the NZBoRA, the parties are nonetheless required to carry the burden in the desired fashion.

context who has to defend an enshrined right and not the plaintiff. The roles of plaintiff and defendant are inverted in comparison to the situation in public law due to the differing respective interest in private law. In a public law context, by contrast, the plaintiff tries to defend her enshrined right against interference by the defendant.

¹⁴⁵⁸ Hence the description as ‘negative scheme.’ Claimant and defendant argue in the opposite way as they would in a public law application of the NZBoRA.

¹⁴⁵⁹ See, eg, *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 75 per Panckhurst and O’Regan JJ (‘In essence Mr Akel argued that legitimate public concern outweighed Mr Roger’s privacy rights’). In other words, the successfully claimed invasion of privacy would *not* represent a justified interference with freedom of speech.

¹⁴⁶⁰ See also *X v Unknown Persons* [2007] EMLR 10 (QBD) para 22 per Eady J.

1.3.2 The public interest feature of the traditional breach of confidence action

We will now turn to the second aforementioned problem and examine whether it is appropriate to draw parallels from traditional breach of confidence doctrine in the context of the new privacy tort. In the broadest sense, both actions are linked because they are concerned with ‘information dissemination.’¹⁴⁶¹ It would appear that the three judges in the majority in *Hosking* made a logical decision by drawing an analogy from the traditional doctrine. It is nevertheless important to note that the precise nature of the public-concern element in traditional breach of confidence doctrine is less clear than the statements in *Hosking* may suggest. Furthermore, the Judges did not consider the situation of the extended version. The basic premise followed by their Honours and scholars alike causes unease, because it is the extended version that is supposed to protect personal information against unwarranted publication – not the traditional concept. Thus, it seems inconsequent to argue that the traditional concept is substantially different from the privacy concept while drawing analogies between them is a valid technique for determining the features of the new tort.¹⁴⁶² Arguing by analogy requires, in the author’s view, similarities between both concepts.¹⁴⁶³ Given that the major difference between the approaches of New Zealand and the UK regarding the protection of personal information is a matter of labels,¹⁴⁶⁴ it might be advantageous to consider the extended version instead.

It is convenient to point to the discussion in the UK. The question concerning the nature of the public interest test had been subject to detailed analysis even prior to the enactment of the HRA. With regard to the traditional concept, Wacks has stressed that it was unclear ‘whether its absence constitutes a substantive requirement of the action, or whether it operates as a defence to what would otherwise be a protected confidence.’¹⁴⁶⁵ The classification as a defence seems to be predetermined by the conceptual

¹⁴⁶¹ D J Solove, ‘A Taxonomy of Privacy’ (2006) 154 *University of Pennsylvania Law Review* 477, 525.

¹⁴⁶² Particularly granted that there is no substantial difference between the British extended breach of confidence action and New Zealand’s privacy tort – see *Hosking* [2005] 1 NZLR 1 (CA) para 247 per Tipping J; M Waterfield, ‘Now You See It, Now You Don’t: the Case for a Tort of Infringement of Privacy in New Zealand’ (2004) 10 *Canterbury Law Review* 182, 205.

¹⁴⁶³ The majority was unanimous with regard to distinctive nature of privacy and confidence – *Hosking* [2005] 1 NZLR 1 (CA) para 246 per Tipping J, paras 45 and 48 per Gault P and Blanchard J.

¹⁴⁶⁴ See *Rogers v TVNZ Ltd* [2007] NZSC 91 para 24 per Elias CJ.

¹⁴⁶⁵ R Wacks, *Privacy and Press Freedom* (1995) 93-4.

basis of the action itself. Equitable remedies are discretionary in contrast to the common law position.¹⁴⁶⁶ A traditional breach of confidence action involves the fact that ‘the plaintiff has entrusted information to a confidant, whether or not its *disclosure* is regarded as being in the public interest.’¹⁴⁶⁷ The traditional doctrine is concerned with maintaining confidences.¹⁴⁶⁸ The very basis of protecting an obligation of *confidence* is grounded in the public interest.¹⁴⁶⁹ The public interest in the *publication* of confidential material is an additional factor, which might appear in a particular case – but it is not an essential factor of the action itself. These statements reveal the more general truism that it cannot possibly be in the public interest to maintain a confidential relationship while it is at the same time in its interest to publish the information. The distinct public interest in the publication is, therefore, what the present writer would regard as a proper defence. The dissemination in spite of the fact that the information has been entrusted to a confidant beforehand is essential for the equitable action; that is to say that the *breach* of confidence is indispensable to the action. Hence, it is conceptually necessary to regard the public interest element as a defence. The discretionary features of the equitable jurisdiction enable the courts to recognise an obligation of confidence while refusing to enforce it for other reasons.¹⁴⁷⁰ The right of the plaintiff, in this context, seems to derive from the relationship of confidence already. The qualification of the public concern test as a defence to the traditional action makes it conceptually clear that it ‘operates to bar the *enforcement* of the right rather than to deny its *existence*.’¹⁴⁷¹ If the public concern test were instead to be treated as a substantive requirement of the action (part of the ‘right’ itself), the existence of a public concern in the publication would mean that the

¹⁴⁶⁶ Ibid, at p 96.

¹⁴⁶⁷ Ibid, at p 94 (emphasis added); see also *Hosking* [2005] 1 NZLR 1 (CA) para 201 per Keith J.

¹⁴⁶⁸ R Tobin, ‘Privacy: One step forward, two steps back’ [2003] *New Zealand Law Journal* 256, 258; see also A Sims, ‘“A Shift in the Gravity Centre”: The dangers of Protecting Privacy Through Breach of confidence’ [2005] *Intellectual Property Quarterly* 27, 49.

¹⁴⁶⁹ A Schreiber, ‘Confidence Crisis, Privacy Phobia: Why Invasion of Privacy should be Independently Recognised in English Law’ [2006] *Intellectual Property Quarterly* 160, 179. The primary purpose for providing a remedy for breach of confidence was not to compensate the individual plaintiff whose confidence had been breached, but that a particular value had been attributed to those kinds of relationships – L Clarke, ‘Remedial Responses to Breach of Confidence: The Question of Damages’ (2005) *Civil Justice Quarterly* 316, 334.

¹⁴⁷⁰ Y Cribbs, ‘The Public Interest defence to the Action for Breach of Confidence and the Law Commission’s Proposals on Disclosure in the Public Interest’ (1984) 4 *Oxford Journal of Legal Studies* 361, 362.

¹⁴⁷¹ R Wacks, *Privacy and Press Freedom* (1995) 96.

obligation of confidence never came into existence.¹⁴⁷² Thus, ‘the courts would be deprived of the opportunity to exercise the discretionary features of their equitable jurisdiction.’¹⁴⁷³ In my eyes, these remarks fortify what already flowed as a matter of logic.

Nevertheless, it is sound that an existing public interest in the maintenance of the confidential relationship is barred from enforcement. Doctrinally, this is possible if the defendant raises a ‘public interest’ defence. The courts must then engage in balancing the public interest in protecting confidential relationships and the public interest in revealing the information protected by this relationship.¹⁴⁷⁴ Since the traditional action focuses on protecting confidence, the defence has only rarely been made out.¹⁴⁷⁵

Moreover, this result is supported by the appropriate burden of proof. It is unusual to cast the burden of disapproving a defence upon the plaintiff.¹⁴⁷⁶ The burden should therefore rest upon the defendant, who has to show why the public interest in receiving the information should prevail over the protection of confidence.¹⁴⁷⁷ Hence, it is suggested that the public-concern element in *traditional* breach of confidence doctrine has to be categorised as a defence.

1.3.3 *The public interest element and the privacy tort*

So what differences go hand in hand with the extension of the traditional concept in order to protect personal information against unwarranted dissemination? Subsequently, I seek to demonstrate that the dissimilarities in English law entail (1) the different nature of the public interest element due to the redundancy of an obligation of confidence and (2) the impact of arts 8 and 10 ECHR.

¹⁴⁷² Y Cribbs, ‘The Public Interest defence to the Action for Breach of Confidence and the Law Commission’s Proposals on Disclosure in the Public Interest’ (1984) 4 *Oxford Journal of Legal Studies* 361, 363.

¹⁴⁷³ R Wacks, *Privacy and Press Freedom* (1995) 96.

¹⁴⁷⁴ Eg, *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2006] EWCA Civ 1776 para 55 per Lord Phillips CJ; see also A Schreiber, ‘Confidence Crisis, Privacy Phobia: Why Invasion of Privacy should be Independently Recognised in English Law’ [2006] *Intellectual Property Quarterly* 160, 179.

¹⁴⁷⁵ A Sims, ‘“A Shift in the Gravity Centre”: The dangers of Protecting Privacy through Breach of Confidence’ [2005] *Intellectual Property Quarterly* 27, 49; see also *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2006] EWCA Civ 1776 para 67 per Lord Phillips CJ.

¹⁴⁷⁶ R Wacks, *Privacy and Press Freedom* (1995) 97.

¹⁴⁷⁷ *Ibid*, at p 111. An exception to this rule, however, is justified when government secrets are concerned. In a free society, there is a constant public interest in scrutinising and criticising the workings of government - *Spycatcher (No 2)* [1990] 1 AC 109, 283 per Lord Goff.

As is well known, the extended breach of confidence does not require a confidential relationship that might prevent the defendant from publishing personal or private information.¹⁴⁷⁸ A ‘reasonable expectation of privacy’ which replaced this requirement derives in the UK from the impact of an individual right (art 8 ECHR), not from a public interest in maintaining this expectation.¹⁴⁷⁹ As a right, it inheres in every person whilst the public interest is external to privacy.¹⁴⁸⁰ The recognition of individual interests notwithstanding, it generally lies in the public interest of a free and democratic society to communicate the truth freely to others – especially in the absence of any obligation or contractual bond between the parties to act otherwise. The public interest, thus, collides with the maintenance of an expectation of privacy.¹⁴⁸¹ The individual’s interest in withholding truthful information is merely actionable if and only insofar as it is not overridden by the public interest in the publication, viz, in matters involving an unjustifiably intrusive exercise of freedom of speech. As this should be the tightly confined exception and not the rule, it does not seem ‘anomalous’ that the public concern test is a mandatory feature of the tort. In the absence of a public interest in maintaining a relationship of confidence, it must generally be possible to publish truthful, albeit private, information. In other words, the question as to whether or not the dissemination of these facts is in the public interest becomes crucial.

The horizontal effect of Convention rights on the extended breach of confidence makes it clear that the right to privacy depends on prevailing over freedom of speech in the balance; a right to privacy does not exist in the absence of this conflict.¹⁴⁸² As we know, a reasonable expectation of privacy is a threshold test, which *necessarily* brings the balancing exercise into play. Although the public interest feature is still listed under

¹⁴⁷⁸ Eg, *Browne* [2007] 3 WLR 289 (CA) para 24 per Sir Anthony Clarke MR; *Hosking* [2005] 1 NZLR 1 (CA) para 201 per Keith J.

¹⁴⁷⁹ *Ibid.*

¹⁴⁸⁰ A Schreiber, ‘Confidence Crisis, Privacy Phobia: Why Invasion of Privacy should be Independently Recognised in English Law’ [2006] *Intellectual Property Quarterly* 160, 179.

¹⁴⁸¹ *Ibid.*

¹⁴⁸² At least as far as the public dissemination of private facts is concerned. In this area, privacy and freedom of speech cannot possibly co-exist peacefully.

‘defences’¹⁴⁸³ to the extended action, the courts accepted that they have ‘absorbed’¹⁴⁸⁴ arts 8 and 10 ECHR for the purposes of the extended (or new) cause of action. Absorbing both articles gave new strength *to the action*.¹⁴⁸⁵ Lord Nicholls opined in *Campbell*, ‘[t]he time has come to recognise that the values enshrined in articles 8 and 10 *are now part of the cause of action* for breach of confidence.’¹⁴⁸⁶ Thus, the right to freedom of speech or public-concern element is not a defence, at least not in a technical sense. This would also be a proper way of recognising a guarantee of a human rights instrument. I should reiterate, although only in passing, that I agree with those who suggest that this ‘development’ of the traditional doctrine has tacitly led to the invention of a privacy tort ‘in all but name’ in English law.¹⁴⁸⁷ Breach of confidence is now arguably subdivided into two separate actions.¹⁴⁸⁸ This must be so, because the protected interests are completely different. However, this is not to suggest that there is no need to pay closer attention to free-speech interests in cases involving the traditional breach of confidence doctrine.¹⁴⁸⁹

In sum, the opposite proportions of rule and exception therefore justify a different characterisation of the ‘public concern’ element. It seems reasonable to suggest that the absence of a public concern in the dissemination of personal information constitutes an element of the tort. The dissemination of truthful information should otherwise be granted as a matter of living in a free and democratic society (and responsibly exercised rights). Moreover, it is the only public interest in play¹⁴⁹⁰ and therefore does not to

¹⁴⁸³ *McKennitt* [2007] 3 WLR 194 (CA) para 68 per Buxton LJ; M Lewis, C Hinton, H Beverley-Smith and G Hussey, ‘Review of the Law of Privacy’ (2005) 16 (7) *Entertainment Law Review* 174, 179.

¹⁴⁸⁴ *A v B Plc* [2002] 2 All ER 545 para 4 per Lord Woolf CJ; see also *Browne* [2007] 3 WLR 289 (CA) para 24 per Sir Anthony Clarke MR; *McKennitt* [2007] 3 WLR 194 (CA) para 11 per Buxton LJ.

¹⁴⁸⁵ *Ibid* (emphasis added).

¹⁴⁸⁶ [2004] 2 All ER 995 (HL) para 17 (emphasis added); cited with approval in *Douglas v Hello! Ltd (No 3)* [2006] QB 125 para 51 per Lord Phillips MR; *McKennitt* [2007] 3 WLR 194 (CA) para 10 per Buxton LJ; *Browne* [2007] 3 WLR (CA) 289 para 22 per Sir Anthony Clarke MR.

¹⁴⁸⁷ G Phillipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 185; J Morgan, ‘Hello! Again: Privacy and Breach of Confidence’ (2005) *Cambridge Law Journal* 549, 550.

¹⁴⁸⁸ N A Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628, 629. See also *Douglas v Hello! Ltd (No 3)* [2007] 2 WLR 920 (HL) paras 118 per Lord Hoffmann and particularly para 255 per Lord Nicholls.

¹⁴⁸⁹ On this point see *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2006] EWCA Civ 1776 paras 67, 68 per Lord Phillips CJ.

¹⁴⁹⁰ It might be suggested that there is strong social interest in the maintenance of spheres of privacy. However, this public interest is in my respectful the reason why a right to privacy is (or should be) in-

merely bar the enforcement of the right as is the case in traditional breach of confidence doctrine. Thus, I suggest that the initial premise chosen is problematic because similarities between both concepts are conditional at best. It is therefore inadequate to draw an analogy from the traditional concept. An ‘analogy’ drawn from the extended version of the UK, however, accomplishes the same result as an application of the NZBoRA. The omission of specific privacy protection (in contrast to art 8 ECHR) makes no difference in this respect. It seems even clearer in this country that freedom of speech, as the only enshrined interest in play, has to be tested against the plaintiff’s privacy interest. In brief, recognising this public interest as an element of the tort rather than a defence would be natural – not anomalous.¹⁴⁹¹

2 Hosking and the remaining prerequisites of the tort

2.1 The ‘highly offensive to a reasonable person’ test

Having discussed the constitutional framework and its effect on freedom of speech concerns, we will now turn to the micro-level of the analysis. The new common law tort needs a coherent development. If it were otherwise, it would be likely to get out of hand.¹⁴⁹² This becomes particularly obvious with regard to the ‘highly offensive to a reasonable person’ test. It seems advantageous to discuss this prerequisite before turning to the initial test of the tort, because Tipping J’s formulation omits an additional ‘highly offensive’ test. As we know, the adoption of the test for the purposes of the privacy tort stems from Prosser’s work.¹⁴⁹³ In accordance with corresponding US law, the Court of Appeal has described both prerequisites as twin-elements.¹⁴⁹⁴ According to Gault P and Blanchard J, the ‘highly offensive’ test is an important factor in order to

cluded in human rights documents such as the ECHR. It is, I think, not a relevant consideration in context of an individual claim to privacy.

¹⁴⁹¹ It may be different with regard to a possible intrusion of privacy tort. As it will be suggested below, the public concern test has no analogue in the ‘intrusion’ context.

¹⁴⁹² See J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 408.

¹⁴⁹³ W L Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383, 396-7; see also *Campbell* [2004] 2 All ER 995 (HL) para 94 per Lord Hope.

¹⁴⁹⁴ *TVNZ Ltd v Rogers* [2007] 1 NZLR 1 (CA) para 122 per Young P.

confine the new privacy tort tightly.¹⁴⁹⁵ The dissemination of personal facts not meeting the standard is one of the costs of living in a free society.¹⁴⁹⁶ However, we have already seen during the discussion of the respective American law that the test lacks a clear legal profile.¹⁴⁹⁷ Subsequently, I hope to offer a structure of this legal transplant. The ultimate aim, as already indicated, is nevertheless to make the test altogether superfluous, viz, by replacing it with a proportionality balancing exercise.

Three major problems have been identified in this context. Firstly, the perspective from which the reasonable person should ‘observe’ the issue is questionable.¹⁴⁹⁸ Two positions have to be distinguished: the objective reasonable person could either be ‘in the shoes of the person the publication is about’ or a reasonable person reading, for instance, an article about someone else’s private information.¹⁴⁹⁹ The English Court of Appeal in *Campbell*¹⁵⁰⁰ and the High Court in *Bradley*¹⁵⁰¹ favoured the perspective of the ‘reasonable reader.’ In *P v D*¹⁵⁰² and the House of Lords’ decision in *Campbell*¹⁵⁰³, the perspective of the ‘plaintiff’s shoes’ was favoured. Linked to this problem is a second uncertainty concerning the question as to whether it is the *disclosure* of the respective facts or rather the *facts themselves* that must be regarded as offensive.¹⁵⁰⁴ Ultimately and most importantly, the nature of the test is questionable. The joint judgment in *Hosking* suggested that the level of offence should be determined ‘objectively, by reference to its extent and nature.’¹⁵⁰⁵ This position has been interpreted as being in contrast to the approach taken in the UK where also subjective elements have been

¹⁴⁹⁵ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 394. See also *Hosking* [2005] 1 NZLR 1 (CA) para 126; their Honours pointed out that even extensive publicity of private matters, which are not sensitive enough, should not give rise to legal liability.

¹⁴⁹⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 125.

¹⁴⁹⁷ See above Chapter Two 2.5.1.3.

¹⁴⁹⁸ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 395-6.

¹⁴⁹⁹ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.04 (3) at p 761.

¹⁵⁰⁰ [2003] 1 All ER 224 (CA) para 54.

¹⁵⁰¹ [1993] 1 NZLR 414, 424.

¹⁵⁰² [2000] 2 NZLR 591 para 39 per Nicholson J.

¹⁵⁰³ [2004] 2 All ER 995 (HL) para 100 per Lord Hope.

¹⁵⁰⁴ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 395. This is often questionable in the USA as well – see P J McNulty, ‘The Public Disclosure of Private Facts: There is Life after Florida Star’ (2001) 50 *Drake Law Review* 93, 105.

¹⁵⁰⁵ *Hosking* [2005] 1 NZLR 1 (CA) para 126.

taken into account.¹⁵⁰⁶ Their Honours nonetheless mentioned that publicity given to the respective facts must be truly humiliating and distressful or otherwise harmful to the *individual* concerned.¹⁵⁰⁷ This formulation, on the other hand, had been interpreted as saying that the import of subjective elements may be allowed in New Zealand.¹⁵⁰⁸ Each of these problems will be addressed next.

2.1.1 Perspective of the reasonable person and determination of offensiveness

The first two of the aforementioned problems, I suggest, are interdependent and there is reason to believe that they could and should be solved together. All judgments are based on one of the following two possible assumptions: the assessment of the level of offence of the reasonable person focuses (1) on the contents of the information disclosed or (2) on the context in which the communicative act occurred.¹⁵⁰⁹ During the discussion of the respective US law, I sought to show that the perspective of the reasonable person is a matter of general jurisprudence and thus not confined to a single test.¹⁵¹⁰ Legal rules can be observed either from an ‘internal’ or an ‘external point of view.’ The external point of view focuses on the result of an act rather than the motivation behind the act, that is to say that the reasonable person observes whether the facts themselves are highly offensive. By taking an ‘internal point of view,’ in contrast, the reasonable person would consider the whole context of the disclosure. Subsequently, this result will be tested against the results found in practical cases supplemented by some logical considerations.

¹⁵⁰⁶ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 254.

¹⁵⁰⁷ *Hosking* [2005] 1 NZLR 1 (CA) para 126.

¹⁵⁰⁸ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 254, see also M Waterfield, ‘Now You See It, Now You Don’t: the Case for a Tort of Infringement of Privacy in New Zealand’ (2004) 10 *Canterbury Law Review* 182, 186.

¹⁵⁰⁹ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 253–4 differentiate between (1) facts or (2) disclosure for the determination of the offensiveness criterion. See also R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 979; J Elford, ‘Trafficking in Stolen Information: A “Hierarchy of Rights” Approach to the Private Facts Tort’ (1995) 105 *Yale Law Journal* 727, 747.

¹⁵¹⁰ See above Chapter Two, 2.3.2.3 – ‘Genuine duties and strict liability rules’.

2.1.1.1 Focussing on the contents in the shoes of the recipient

Decisions such as *Bradley*¹⁵¹¹, the English Court of Appeal's decision in *Campbell*¹⁵¹² and a US decision in *Vassiliades v Garfinckel's Brooks Bros*¹⁵¹³ focus solely on the contents of the disseminated information while determining the level of offensiveness.¹⁵¹⁴ This assumption anticipates the solution of the second problem - it does not seem to exist in this context. Since the facts have to be offensive, the perspective (plaintiff or recipient) from which the offensiveness is observed is meaningless as an additional requirement. The reasonable person can theoretically either stand in the shoes of the plaintiff or orbit around these facts and they always remain offensive from each perspective.

However, the aforementioned judgments deal with the public dissemination branch of the tort. If one takes the communicative act (publication/publicity) into consideration, the reasonable person necessarily has to occupy the perspective of the recipient. The facts are offensive with or without the communicative act; the disclosure is therefore not determinative for the offensiveness. Thus, the reasonable person could not stand in the shoes of the claimant; an additional communicative act would have no (logical) function in this case. The English Court of Appeal's decision in *Campbell* reflects this suggestion by mentioning:¹⁵¹⁵

[w]e do not consider that a reasonable person of ordinary sensibilities, on *reading that Miss Campbell was a drug addict*, would find it highly offensive, or even offensive, that the Mirror also *disclosed that she was attending meetings of Narcotics Anonymous*.

The decision in *L v G*¹⁵¹⁶ is not that clear-cut but has the same tendency. Abbott J demanded 'that the *facts which were disclosed* would be *highly offensive* and objec-

¹⁵¹¹ *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 per Gallen J; 24 IPR 205 per Neazor J; see *Andrews v TVNZ Ltd* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 53.

¹⁵¹² [2003] 1 All ER 224.

¹⁵¹³ 492 A 2d 580 (1985).

¹⁵¹⁴ *Vassiliades v Garfinckel's Brooks Bros*, 492 A 2d 580, 588 (DC 1985); *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 414, 424.

¹⁵¹⁵ [2003] 1 All ER 224 (CA) para 54 (emphasis added).

¹⁵¹⁶ [2002] NZAR 495 (DC).

tionable to a reasonable person of ordinary sensibilities.’¹⁵¹⁷ The test hence focuses on the contents of the information disclosed. The Judge concluded, ‘[...] the issue of objectionability to the public disclosure of such [sexually explicit] photographs must be judged not from *her* [the plaintiff’s] *perspective*, in the context of the circumstances in which the photographs were taken, but by reference to an objective ‘reasonable person of ordinary sensibilities’ test.’¹⁵¹⁸ His Honour’s examination of the test regrettably ends with this statement. The comprehensible part of the Judge’s statement with regard to the appropriate ‘perspective’ is most likely that the reasonable person was not supposed to examine from a claimant position. The circumstances under which the defendant took the explicit photographs were not determinative. Abbott J rather envisaged a prudent bystander of the incidents as reasonable person.

It seems fair to suggest, in conclusion, that a focus on the contents of the disclosed information correlates with a reasonable person in the shoes of the recipient.¹⁵¹⁹ This result fortifies the argument from general jurisprudence. Thus understood, the test would constitute an external ‘strict liability rule.’

2.1.1.2 Focussing on the context of the disclosure in the shoes of the plaintiff

The underlying assumption of the second possible perspective of the reasonable person presupposes that the dissemination of the certain facts might be offensive in some scenarios but not in others.¹⁵²⁰ In *P v D*, Nicholson J explained that the test had to be satisfied ‘on the basis of what a reasonable person of ordinary sensibilities would feel if they were in the same position; that is, in the context of the particular circumstances.’¹⁵²¹ As Post argues, the test requires the ‘evaluation of communicative acts;’ this assessment has to encompass the ‘communicative *content*, but also such varied as-

¹⁵¹⁷ Ibid, p 506.

¹⁵¹⁸ Ibid (emphasis added).

¹⁵¹⁹ I should probably point out that I do not endorse this view.

¹⁵²⁰ See *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 68 per Panckhurst and O’Regan JJ (‘[...] public disclosure in a controlled environment like a courtroom may not be offensive, but transmission of excerpts of the videotape on national television may be’); J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 391, 395; E Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50 *University of Toronto Law Journal* 305, 328.

¹⁵²¹ *P v D* [2000] 2 NZLR 591 para 39

pects of these acts as their timing, justification, addressees, form, and general context.¹⁵²² Thus understood, it is accurate to observe that the disseminated facts in *Bradley* ‘were the plot [of a schlock horror movie] itself.’¹⁵²³ It was not determinative that the tombstone [which contained the disputed ‘facts’ in a narrow sense] of the Bradley family itself contained offensive information. In New Zealand, the recognition of the full context had been encapsulated in the statement that it has to be the ‘disclosure’ of the facts that must be offensive.¹⁵²⁴ Apart from *P v D*¹⁵²⁵, this result is supported by the findings in *TVNZ Ltd v Rogers*¹⁵²⁶, *Andrews v TVNZ Ltd*¹⁵²⁷, the House of Lords’ decision in *Campbell*¹⁵²⁸ and the appellate court’s decision in *Vassiliades v Garfinckel’s Brooks Bros*¹⁵²⁹. All these decisions, however, have in common that they assess the circumstances of the public dissemination. They also have in common that this assessment has been carried out from the plaintiff’s perspective, as it has been suggested in *P v D*.

Thus, the two problems can be reduced to one due to their interdependency. Examined superficially, the recognition of the context from the internal perspective seems favourable. Only a few facts are offensive in themselves.¹⁵³⁰ The very essence of this test is to control the subjective result based on the subjective impression of the plaintiff from an objective point of view.¹⁵³¹ Thus, the test establishes whether it is justified to impose legal liability for the ‘loss’ of privacy the plaintiff has suffered.¹⁵³² This quite naturally requires that the ‘reasonable person’ examines the matter from the same position as the plaintiff involving the circumstances of the respective case.¹⁵³³ The reason-

¹⁵²² R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 979.

¹⁵²³ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 253.

¹⁵²⁴ Ibid, at p 254; see also R Tobin, ‘Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand’ (2004) 12 *Tort Law Journal* 95, 103.

¹⁵²⁵ [2000] 2 NZLR 591 para 39.

¹⁵²⁶ [2007] 1 NZLR 156 (CA) paras 66-69 per Panckhurst and O’Regan JJ; *Rogers v TVNZ Ltd* (2005) 22 CRNZ 668 (HC) paras 58-60 per Venning and Winkelmann JJ.

¹⁵²⁷ High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 49.

¹⁵²⁸ [2004] 2 All ER 995 (HL) paras 99, 100 per Lord Hope.

¹⁵²⁹ 492 A 2d 580, 588 (DC 1985).

¹⁵³⁰ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 391, 395; see also J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.04 at p 761.

¹⁵³¹ *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 67 per Panckhurst and O’Regan JJ.

¹⁵³² Ibid.

¹⁵³³ See also *Andrews v TVNZ* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 49.

able person, defined as a prudent bystander, would not fulfil this control function - especially not if the particular circumstances of the case are not considered in any way.¹⁵³⁴ The recipient must not necessarily be aware of all circumstances, which may turn innocuous into offensive facts.

As I will argue later, however, the perspective of the innocent bystander is nonetheless preferable. For reasons suggested below, it may be the only perspective from which the 'objectivity' of the standard can be maintained without facing considerable problems. In any case, this is decidedly not saying that the adoption of a 'reasonable person' test is a jewel in the circlet of sensible choices. Whether the test indeed represents such a jewel will be considered next.

2.1.2 The nature of the test from a 'scientific' perspective

With regard to the third aforementioned problem, concerned with the nature of the test, it might be advantageous recalling the nature of the test as proposed by Anderson – it is supposedly an empirical test.¹⁵³⁵ The term 'empiric' derives from the Greek word for experience;¹⁵³⁶ the empirical method usually requires the collection of data on which a scientist bases a theory, or more importantly in this context, derives a conclusion. Oliver Wendell Holmes' influential tort theory, for instance, focuses on foresight measured on 'common experience' as opposed to 'individual experience.'¹⁵³⁷ Prosser's view on tort theory has explicitly linked 'reasonableness to utility maximization' and has thereby incorporated Holmesian concepts into modern US tort theory.¹⁵³⁸

A scientific approach to the reasonable person seems inadequate however. The legal profession usually does not deal with 'science' in a strict sense. Post consequently argues that the essence of the US test of the tort cannot be represented by an empirical

¹⁵³⁴ See *Campbell* [2004] 2 All ER 995 (HL) para 99 per Lord Hope.

¹⁵³⁵ See above Chapter Two, 1.2.1.

¹⁵³⁶ *Shorter Oxford Dictionary* (5th ed, 2002) Vol 1.

¹⁵³⁷ H Hovenkamp, 'The Marginalist Revolution in Legal Thought' (1993) 46 *Vanderbilt Law Review* 305, 336; see O W Holmes, Jr, *The Common Law* (MacMillan, London 1882) 147.

¹⁵³⁸ J C Goldberg and B C Zipursky, 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733, 1757.

and thus statistical average.¹⁵³⁹ Notwithstanding, an initial ‘scientific approach’ might be instructive in order to determine the terms ‘subjective’ and ‘objective’ in the context of the reasonable person of the privacy tort. Furthermore, it might be helpful for a civil lawyer to understand a theoretical legal framework or culture influenced by ‘empiricists’ such as John Stuart Mill.¹⁵⁴⁰ Subsequently, the author will attempt to sketch that ‘experience’ plays indeed an important part when light is shed on the reasonable person in the law of negligence.¹⁵⁴¹ This seems necessary to understand the conflict of this system with a human rights instrument, which will be addressed later.¹⁵⁴²

In the law of negligence, for instance, the appropriate degree of reasonable care in a profession ‘can usually be established by reference to long-standing practice in that profession.’¹⁵⁴³ In terms of the scientific method, we have ‘data’ to derive a conclusion from for the purposes of the individual case in order to determine the reasonableness of liability. In other words, in this area of the law we often have the necessary ‘experience’ to draw such a conclusion.¹⁵⁴⁴ As a principle of liability, the reasonable person concept may thus establish ‘reciprocity of care between ourselves.’¹⁵⁴⁵ Simultaneously, ‘the harm-sufferer’s entitlement and the harm-doer’s obligation are mirror images of one another.’¹⁵⁴⁶ The negligence standard can therefore be described as objective inasmuch as the law ‘generally refuses to allow the peculiarities or idiosyncrasies of the defendant to

¹⁵³⁹ R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 961.

¹⁵⁴⁰ See for further details M Richardson, ‘The Private Life after Douglas v Hello!’ [2003] *Singapore Journal of Legal Studies* 311, 317-8. See generally P A Joseph, *Constitutional and Administrative law in New Zealand* (3rd ed, 2007) para 1.3.2 at p 7.

¹⁵⁴¹ I am indebted to Mayo Moran’s book *Rethinking the Reasonable Person* (2003) for many ideas in this context.

¹⁵⁴² This is the important underlying conflict of a ‘constitutionalised’ common law tort of privacy – see also M Richardson, ‘Privacy and Precedent – The Court of Appeal’s Decision in Hosking v Runting’ [2005] *New Zealand Business Law Quarterly* 82, 93.

¹⁵⁴³ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 395; see also T Honoré, *Responsibility and Fault* (1999) 17.

¹⁵⁴⁴ See also O W Holmes, Jr, *The Common Law* (Macmillan, London 1882) 147.

¹⁵⁴⁵ J Horder, ‘Can the Law do without the Reasonable Person?’ (2005) 55 *University of Toronto Law Journal* 253, 254 citing A Brudner, *The Unity of the Common Law* (University of California Press, 1995) 190. ‘Reciprocity’ denotes a standard of care ordinary people normally impose on each other - G P Fletcher, ‘Fairness and Utility in Tort Theory’ (1972) 85 *Harvard Law Review* 537, 560 fn 82. See also P Cane, ‘Distributive Justice and Tort Law’ [2001] *New Zealand Law Review* 401, 403; O W Holmes, Jr *The Common Law* (MacMillan, London 1882) 108; compare G C Keating, ‘Reasonableness and Rationality in Negligence Theory’ (1996) 48 *Stanford Law Review* 311, 313.

¹⁵⁴⁶ P Cane, ‘Distributive Justice and Tort Law’ [2001] *New Zealand Law Review* 401, 419.

diminish the degree of care she is required to exercise in her interaction with others.’¹⁵⁴⁷ While discussing American law, it has already been suggested that the reasonable person expresses an idea of equality insofar as all have the same interest in both liberty and security.¹⁵⁴⁸ If somebody bumps into a car or breaks somebody’s leg, these peculiarities are of minor or no interest. It is most likely the focus on material loss or damage, which justifies ‘drawing a hard line.’¹⁵⁴⁹

Idiosyncrasies are only allowed to a limited extent. The ‘reasonable care’ between lawyer and client is most likely determined by looking at the standards of the profession, of her peer group; she is hence tried by the standard of a reasonable lawyer.¹⁵⁵⁰ This limited recognition of the context is justified, since many would find it absurd judging her by the reasonable care of an average (professional) New Zealander. In the end, it is sometimes a matter of ‘avoidability’ that requires recognition of the context.¹⁵⁵¹ Being a lawyer is a ‘normal’ peculiarity of the defendant and therefore subject to ‘experience.’ Being a child is in tune with this observation inasmuch as it is a ‘normal’ state and, therefore, a ‘normal incapacity’ with regard to the law of negligence. The reasonable person in US law acknowledges this incapacity because ‘there is a wide basis of *community experience* upon which it is possible, *as a practical matter*, to determine what is *expected* from them.’¹⁵⁵² In other words, it is normality or ordinariness, which justifies applying a more ‘subjectivised’ objective test.¹⁵⁵³ In terms of the scientific method, we have again empirical data in order to determine liability. As a result,

¹⁵⁴⁷ M Moran, *Rethinking the Reasonable Person* (2003) 234 (emphasis added); see also W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 153; P Kelley, ‘Infancy, Insanity and Infirmity in the Law of Torts’ (2003) 48 *American Journal of Jurisprudence* 179, 185; D E Seidelson, ‘Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent’ (1981) 50 *George Washington Law Review* 17-8.

¹⁵⁴⁸ See above Chapter Two, 2.5.1.1; A Ripstein, *Equality, Responsibility, and the Law* (1999) 7.

¹⁵⁴⁹ J Horder, ‘Can the Law do without the Reasonable Person?’ (2005) 55 *University of Toronto Law Journal* 253, 268.

¹⁵⁵⁰ The author presupposes that a lawyer is accountable for her actions, which is apparently slowly evolving in New Zealand – see *Lai v Chamberlains* [2006] NZSC 70 (Barristerial immunity).

¹⁵⁵¹ See generally O W Holmes, Jr, *The Common Law* (Macmillan, London 1882) 108 (‘The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for’).

¹⁵⁵² Restatement (Second) of Torts s 283A, Comment b (emphasis added); M Moran, *Rethinking the Reasonable Person* (2003) 24, 77; W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 154.

¹⁵⁵³ W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 155.

the reasonable person may turn into the ‘reasonable child.’¹⁵⁵⁴ This standard is not subjective, but could be described as ‘intermediate’ between subjective and objective.¹⁵⁵⁵

With regard to other defendants, however, this ‘experience’ is limited. Most notable in this context are mentally disabled human beings and other individuals with unfamiliar idiosyncrasies. These persons are treated unfavourably under the objective standard.¹⁵⁵⁶ This is partly justified by the proposition that ‘general welfare’ requires individuals to sacrifice their peculiarities.¹⁵⁵⁷ As Prosser mused, ‘it may be no bad policy to hold a fool according to his folly.’¹⁵⁵⁸ Prosser, as we recollect, shared the views held by Holmes.¹⁵⁵⁹ As in Holmes’ case, Prosser’s ‘policy’ correlates with a certain concept of those subject to the law, with a particular image of the human being. ‘The individual is a congenital fool,’ Prosser suggests, ‘cursed with inbuilt bad judgement, or that in the particular instance he “did not stop to think”, or that he is merely a stupid ox, or of an excitable temperament which causes him to lose his head and get “rattled”.’¹⁵⁶⁰

However, the reasonable person test does not acknowledge the peculiarities of mentally disabled human beings.¹⁵⁶¹ ‘Avoidability’ is of little concern in this respect;¹⁵⁶² these people are subject to utmost objectivity.¹⁵⁶³ The common law’s treatment of mentally disordered or disabled persons is a habit rooted in the judicial reliance

¹⁵⁵⁴ See also O W Holmes, Jr, *The Common Law* (Macmillan, London 1882) 109; P Kelley, ‘Infancy, Insanity and Infirmity in the Law of Torts’ (2003) 48 *American Journal of Jurisprudence* 179, 180.

¹⁵⁵⁵ T Honoré, *Responsibility and Fault* (1999) 34.

¹⁵⁵⁶ J Horder, ‘Can the Law do without the Reasonable Person?’ (2005) 55 *University of Toronto Law Journal* 253, 266; M Moran, *Rethinking the Reasonable Person* (2003) 149.

¹⁵⁵⁷ See O W Holmes, Jr, *The Common Law* (Macmillan, London 1882) 108.

¹⁵⁵⁸ W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 153; W P Keeton (ed), *Prosser and Keeton on Torts* (5th ed, 1984) 177.

¹⁵⁵⁹ J C Goldberg and B C Zipursky, ‘The Moral of MacPherson’ (1998) 146 *University of Pennsylvania Law Review* 1733, 1750.

¹⁵⁶⁰ W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 152-3 (internal citations omitted); W P Keeton (ed), *Prosser and Keeton on Torts* (5th ed, 1984) 176-7.

¹⁵⁶¹ W P Keeton (ed), *Prosser and Keeton on Torts* (5th ed, 1984) 177.

¹⁵⁶² In US law, the standard of care is relaxed in contributory or comparative negligence – see G C Keating, ‘Reasonableness and Rationality in Negligence Theory’ (1996) 48 *Stanford Law Review* 311, 371.

¹⁵⁶³ Restatement (Second) of Torts, s 283B comment c (‘the actor is held to the standard of conduct of a reasonable man who is not mentally deficient, even though it is in fact beyond his capacity to conform to it’); see also W P Keeton (ed), *Prosser and Keeton on Torts* (5th ed, 1984) 177 (‘[...] the mentally deranged or insane defendant [is held] accountable for his negligence as if the person were a normal, prudent person’); P Kelley, ‘Infancy, Insanity and Infirmity in the Law of Torts’ (2003) 48 *American Journal of Jurisprudence* 179, 180.

on common sense.¹⁵⁶⁴ A mentally disabled human being is ‘abnormal’ whereas the common law’s yardstick for judging the actions of litigants is ‘normality.’¹⁵⁶⁵ These litigants are beyond the reasonable person’s grasp and, therefore, tried by a stricter standard than other defendants.

In order to gain insight into the functioning of the reasonable person, one must contrast this to physically disabled humans. According to Prosser, these persons ‘cannot be required to do the impossible by conforming to physical standards which [they] cannot’ meet.¹⁵⁶⁶ Physically disabled humans are therefore subject to a lesser degree of objectivity.¹⁵⁶⁷ Therefore, what makes the reasonable person tick? At least in the USA, the answer seems to be ‘experience.’ The Restatement explains it as follows: ‘the explanation between such physical illness and the mental illness [...] probably lies in the greater public familiarity with the former, and the comparative ease and certainty with which it can be proved.’¹⁵⁶⁸ Thus, public familiarity with the ‘normal’ peculiarity leads to the transformation of the ‘objective reasonable person’ into, by way of illustration, the ‘objective reasonable blind person.’¹⁵⁶⁹ After all, it is fair to conclude that

- the reasonable person, particularly of the US negligence tort, is less objective whenever there is solid ‘experience’ with the ‘subjectivised’ objective standard;

¹⁵⁶⁴ J Horder, ‘Can the Law do without the Reasonable Person?’ (2005) 55 *University of Toronto Law Journal* 253, 255 (‘In the ‘common sense’ view, mentally disordered or disabled people are to be judged to a fixed standard that, in order to maintain the supposed objectivity of the standard, makes no allowance even for shortcomings [...]’).

¹⁵⁶⁵ See J Horder, ‘Can the Law do without the Reasonable Person?’ (2005) 55 *University of Toronto Law Journal* 253, 254; see also J C Goldberg and B C Zipursky, ‘The Moral of MacPherson’ (1998) 146 *University of Pennsylvania Law Review* 1733, 1740.

¹⁵⁶⁶ W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 152; with regard to children at p 154 (‘[...] obviously cannot be held to the same standard as adults, because they cannot in fact meet it’).

¹⁵⁶⁷ While a more detailed elaboration is beyond the scope of this analysis, this might constitute a so-called intra-group discrimination – see P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 17.16 for further details.

¹⁵⁶⁸ Section 283C comment b Restatement 2nd of Torts (1977); see too section 283B comment b (1); O W Holmes, Jr, *The Common Law* (Macmillan, London 1882) 109; M Moran, *Rethinking the Reasonable Person* (2003) 28.

¹⁵⁶⁹ See Section 283C comment a Restatement 2nd of Torts (1977). See also the illustrative distinction between ‘ordinary’ and ‘abnormal’ in *Attorney General for Jersey v Holley* [2005] UKPC 23 para 13 per Lord Goff; P Kelley, ‘Infancy, Insanity and Infirmary in the Law of Torts’ (2003) 48 *American Journal of Jurisprudence* 179, 180.

- the reasonable person standard has to be strictly objective (due to the lack of experience) provided that the flesh-and-blood person features idiosyncrasies difficult to track with common sense (such as being mentally disabled).

The focus on common sense might thus be problematic in a different context. Privacy law commonly deals to a greater extent with individuality;¹⁵⁷⁰ it may often be difficult to find even a homogenous group such as a certain profession. During the discussion of the respective US law, I have already suggested that privacy is an individual concern. As such, it is not subject to empirical evaluation.¹⁵⁷¹ In fact, the words ‘idiot,’ ‘idiosyncrasy’ or ‘peculiarity’ all derive from the Greek ‘idios,’ which means ‘own’ or ‘private.’¹⁵⁷² Apart from the so-called ‘clear cases,’¹⁵⁷³ it might hence be the rule to deal with those particularities of the plaintiff, whose recognition is refused with regard to the reasonable person standard in the law of negligence. Gregory Keating was able to observe that ‘judgments of negligence turn on the balance of the benefits and burdens associated with particular risk impositions;’ these ‘judgments cannot be made without some benchmark of comparison.’¹⁵⁷⁴ In privacy law, by contrast, the plaintiff of the ‘not so clear case’ belongs to the ‘foolish’ as much as it is her idiosyncrasies which may be the main event of the action. In sum, the application of a reasonable person test might therefore not be as easy in the context of the privacy tort.¹⁵⁷⁵ In terms of the aforementioned categorisation, one would expect that the privacy plaintiff be subject to utmost objectivity. This is because a proper benchmark for comparison, as necessary for the application of the test in negligence law, might often unlikely to be found in the

¹⁵⁷⁰ E J Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 *New York University Law Review* 962, 971.

¹⁵⁷¹ S Ingber, ‘Rethinking Intangible Injuries: A Focus on Remedy’ (1985) 73 *California Law Review* 772, 850.

¹⁵⁷² M Moran, *Rethinking the Reasonable Person* (2003) 149.

¹⁵⁷³ A ‘clear case’ (eg, regarding one’s health, sexual relationships) might be identified as a violation of ‘privacy’ with common sense.

¹⁵⁷⁴ G C Keating, ‘Reasonableness and Rationality in Negligence Theory’ (1996) 48 *Stanford Law Review* 311, 315 (emphasis added).

¹⁵⁷⁵ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 395; See also U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 262 (‘The Authority [BSA] has produced a series of decisions that have no apparent linking rationale that are simply based on the facts in the complaint’).

context of the privacy tort.¹⁵⁷⁶ It is presumably for this reason that at least the highly offensive criterion of New Zealand's test, despite its linking to the reasonable person, 'is of necessity quite subjective.'¹⁵⁷⁷

Speaking of subjectivity, it is worth reiterating that the Court of Appeal in *Rogers* pointed out that the test should control the subjective impression of the plaintiff from an objective perspective. But is it merely the 'highly offensive' criterion, which is of necessity quite subjective? We have already seen during our previous exposition that the reasonable person occasionally transforms, for instance, into the 'reasonable child.' Thus, one question in a privacy context could be as to how objective the objective test should be. In other words, from which group of people do we want to draw our conclusion in order to decide the outcome of the individual case? Furthermore, what would the theoretical justification for the heightened subjectivity of the test be like if it were not 'experience' with the plaintiff's idiosyncrasy?

At this point we recall the example of the photographed All Black player.¹⁵⁷⁸ The reasonable person standard could feature, for example, a reasonable New Zealander, a reasonable NZ Samoan, a reasonable sports person, a reasonable rugby player and so forth. According to the original US test, it would be the reasonable New Zealander – the highest level of abstraction lest freedom of speech is unwittingly 'chilled.'

In the author's view, the reasonable person in *Campbell*¹⁵⁷⁹ was a 'reasonable drug addict receiving therapeutic treatment.'¹⁵⁸⁰ Thus, the major difference to the application of the test in the USA is that the reasonable person in *Campbell* was not a 'rea-

¹⁵⁷⁶ A mentally disabled person, for instance, is subject to utmost objectivity because of 'the very obvious difficulty of proof as to what went on in his head' – W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 153.

¹⁵⁷⁷ J F Burrows, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389, 395; see also M Waterfield, 'Now You See It, Now You Don't: the Case for a Tort of Infringement of Privacy in New Zealand' (2004) 10 *Canterbury Law Review* 182, 186.

¹⁵⁷⁸ See above Chapter Three, 1.2.

¹⁵⁷⁹ See *Campbell* [2004] 2 All ER 995 (HL) ('The context was that of a drug addict who was receiving treatment. [...] A drug addict who was trying to benefit from meetings to discuss her problem anonymously with other addicts would be expected to find the disclosure of those details distressing and highly offensive'); see also at para 98 per Lord Hope.

¹⁵⁸⁰ See also U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 254.

sonable Briton' - it is the aforementioned 'reasonable drug addict.'¹⁵⁸¹ Within the confines of the English test, the recognition of the case's context apparently leads to a lesser degree of abstraction, a lesser degree of objectivity without explaining why this should be case. The same phenomenon occurred earlier in *P v D*,¹⁵⁸² as it will be pointed out further on in this section. It is quite difficult to see, however, that a judge, who is white, upper middle class and orthodox, has any experience of the feelings of the 'reasonable drug addict receiving treatment.'¹⁵⁸³ It seems to be a matter of whether or not the plaintiff should be tried by the 'standards of her peers.' The plaintiff shares, of course, certain features with her peers as much as a lawyer shares at least this feature with other lawyers – that is what makes it seemingly reasonable to draw a conclusion. The recognition of the context might hence create an impression of subjectivity, but it is theoretically still a less abstract objective test.

The inherent problem might nonetheless be the lack of experience, which, as we have noted, traditionally justifies a 'more subjective' objective test. The 'reasonable drug addict' exemplifies this problem. In conclusion, it is suggested that an application of the test based on community experience does not lead to a fully satisfactory explanation. The remaining uncertainty, I suggest, stems from the necessity to recognise '*individual* experience' at least to a certain degree. Hence, the practical consequences for the legal test will be considered next.

2.1.3 *The nature of the test from a legal perspective*

So what is the nature of the legal test if it is not 'empiric'? The privacy tort in general and the reasonable person in particular deals with 'offensiveness' and 'humiliation.'¹⁵⁸⁴ Lurking in the background is most likely an affront to one's dignity as a hu-

¹⁵⁸¹ See also L Brazell, 'Confidence, Privacy and Human Rights: English Law in the Twentieth Century' (2005) 27 *European Intellectual Property Review* 405, 407.

¹⁵⁸² The decision was cited with approval in *Campbell* [2004] 2 All ER 995 (HL) para 100 per Lord Hope.

¹⁵⁸³ Compare *Campbell* [2004] 2 All ER 995 (HL) para 98 per Lord Hope ('I would expect a drug addict who was trying to benefit from meetings to discuss her problem anonymously with other addicts to find this distressing and highly offensive')

¹⁵⁸⁴ See N A Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628, 645 for possible differences between the two terms.

man being.¹⁵⁸⁵ Humiliation can be interpreted as a mental process, which might be too complex to assess with common sense.¹⁵⁸⁶

‘Sticks and stones may break my bones’ is hence a misconceived concept here. Rather, it seems to be part of the human frailty that words sometimes hurt us. In fact, the dissemination of private information may even affect the physical and mental health and wellbeing of those concerned.¹⁵⁸⁷ However, incorporating the gist of the action also places a heavy burden on the test. The highly offensive to a reasonable person standard is then meant to ‘serve as the most important part of a legal norm, and not just as the mental state pertaining to one element of an elaborately defined’ offence or wrong.¹⁵⁸⁸ The test seems to exemplify a hybrid standard inasmuch as it combines a ‘mental state’ (being highly offended) with a ‘justification’ element (‘true’ humiliation of a reasonable person) as parts of a general test of legal liability.¹⁵⁸⁹ Furthermore, its hybrid nature provides a first hint as to why the test contains subjective as well as objective elements.¹⁵⁹⁰

With regard to the structure of the test, it would certainly be most desirable to draw conclusions from another reasonable person test. The author should point out that he asks himself how to construe an objective test, which is adjacent to a subjective ‘highly offensive’ criterion. This should be carried out without reinventing the wheel and the idea of drawing an analogy follows naturally. However, tort law does not lead far, or so it seems.

¹⁵⁸⁵ See also J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 378; see also J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.04 at p 761.

¹⁵⁸⁶ See also *R v Rongonui* [2000] 2 NZLR 385 (CA) para 236 per Tipping J.

¹⁵⁸⁷ *Hosking* [2005] 1 NZLR 1 (CA) para 239 per Tipping J; see also R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 960.

¹⁵⁸⁸ See K W Simons, ‘Rethinking Mental States’ (1992) 72 *Boston University Law Review* 463, 552-3.

¹⁵⁸⁹ *Ibid*; see also R A Smolla, ‘Accounting for the Slow Growth of American Privacy Law’ (2002) 27 *Nova Law Review* 289, 303.

¹⁵⁹⁰ See also U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 254; see also at p 262 for the BSA (‘This requirement contains both subjective and objective elements’); see also N A Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628, 632; R A Smolla, ‘Accounting for the Slow Growth of American Privacy Law’ (2002) 27 *Nova Law Review* 289, 303 (‘Offensiveness has an inherently subjective quality’) and G Phillipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 196.

Given that the test contains subjective and objective elements, it seems rational to compose the objective test out of a subjective and an objective (sub-) test. This proposition gains impetus from the apparent necessity to ‘prevent’ the decision-maker from delivering moral judgments, which are in the end merely a matter of impression.¹⁵⁹¹ In its present state, the test appears to be an unconvincing option. The reasonable person was introduced to the common law in the middle of the nineteenth century.¹⁵⁹² Its invention was part of a positivistic movement – away from a system of dispute resolution wholly based on a case-by-case development towards a system in which ‘cases are judged in accordance with a standard independent of a given set of facts.’¹⁵⁹³ The idea behind the invention was avoiding the assessment of the merits of the plaintiff’s claim uniquely on the facts of each case. In such a system, findings of tort liability were always morally and legally particularistic and thus resistant to treatment as binding precedents.¹⁵⁹⁴ Granted that the reasonable person test, reinvented for the purposes of the privacy tort, turns out morally and legally particularistic decisions, based on impression of the facts of the case and resistant to binding precedent, it ought to indicate a problem.¹⁵⁹⁵ In my view, at least the traditional premise, with which the application of the test had been justified, would no longer be met. Instead, the same decision would be delivered under the guise of a reasonable person that has to be avoided by the reason-

¹⁵⁹¹ See J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 395.

¹⁵⁹² *Attorney General for Jersey v Holley* [2005] UKPC 23 580, 585; J Horder, ‘Can the Law do without the Reasonable Person?’ (2005) 55 *University of Toronto Law Journal* 253, 253; P Kelley, ‘Infancy, Insanity and Infirmity in the Law of Torts’ (2003) 48 *American Journal of Jurisprudence* 179, 181.

¹⁵⁹³ J Horder, ‘Can the Law do without the Reasonable Person?’ (2005) 55 *University of Toronto Law Journal* 253, 254; see also P Kelley, ‘Infancy, Insanity and Infirmity in the Law of Torts’ (2003) 48 *American Journal of Jurisprudence* 179, 181.

¹⁵⁹⁴ *Ibid*; see also M Richardson, ‘Privacy and Precedent: The Court of Appeal’s Decision in *Hosking v Runting*’ (2005) 11 *New Zealand Business Law Quarterly* 82, 83 – she points out with regard to breach of confidence that “early equity courts notoriously had no system of precedent, their function being to decide disputes according to principles of justice and fairness. However, even without a system of precedent, precedents began to form. By the middle of the 19th century they were in common use” – internal citations omitted, emphasis hers).

¹⁵⁹⁵ This, however, is apparently the result of applying the test in New Zealand – see U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 262 with respect to decisions of the BSA (‘The Authority has produced a series of decisions that have no apparent linking rationale that are simply based on the facts in the complaint’); the Authority has stated ‘enigmatically’ that the underlying principle of the test therefore needs rephrasing – at p 264. A similar observation has been made in the USA. The Supreme Court of Colorado observed the ‘determination of whether a disclosure is highly offensive to the reasonable person is a question of fact and depends on the circumstances of a particular case’ – *Ozer v Borquez*, 940 P 2d 371, 378 (1997); see also *Florida Star v BJJF* 491 US 524, 539 (1989).

able person in the first place. Such a performance of the test, however, could be regarded as a juridical burlesque rather than a valid option for a privacy tort.

Although already an outmoded concept, it is useful to draw an analogy from the current provocation defence in criminal law. Even Oliver Wendell Holmes as the perhaps most famous exponent of external objective tests saw the necessity to structure provocation in this way. In his view, the twofold test involved ‘actual provocation’ (a subjective test) and ‘sufficient provocation’ (an objective test).¹⁵⁹⁶ Thus, such an analogy might provide a model to structure and determine objectiveness and subjectivity of the privacy tort’s test. Notwithstanding, it will be argued that a subjective-objective test is the preferable, albeit ill-fated, concept. The external bystander, however inappropriate, seems to remain the only option to apply the reasonable person test in the context of the new tort.

Historically, scholars and commentators were nonetheless at pains distinguishing tortious from criminal conduct.¹⁵⁹⁷ It does not even seem unreasonable to suggest that this sharp distinction led to the recognition of torts as a discrete branch of law. As Benjamin Zipursky notes, ‘the efforts of Anglo-American lawyers and jurists to articulate a law of torts has been part and parcel of a longstanding effort to distinguish tort and crime.’¹⁵⁹⁸ As a result, one might argue that the idea of drawing an analogy from criminal law must be ruled out per se in the context of the modern law of torts.¹⁵⁹⁹ One anticipated objection to the suggested analogy would consequently point to the fact that criminal law is generally more concerned with personal fault as distinct from the objective ‘fault’ of tort law.¹⁶⁰⁰ A second objection would point out that the provocation de-

¹⁵⁹⁶ W A Lindquist, ‘Oliver Wendell Holmes and External Standards of Criminal and Tort Liability’ (1979) 28 *Buffalo Law Review* 607, 611.

¹⁵⁹⁷ B C Zipursky, ‘Ten Half-Truths about Tort Law’ (2008) 42 *Valparaiso Law Review* 1221, 1225, 1228.

¹⁵⁹⁸ Ibid, at p 1229.

¹⁵⁹⁹ See generally *McLaughlin v O’Brian* [1982] 1 AC 410 (HL) per Lord Wilberforce (‘To argue from one factual situation to another and to decide by analogy is a natural tendency of the human and the legal mind. But the lawyer still has to inquire whether, in so doing, he has crossed some critical line behind which he ought to stop’).

¹⁶⁰⁰ R Mullender, ‘The Reasonable Person, The Pursuit of Justice, and Negligence Law’ (2005) 68(4) *Modern Law Review* 681, 691-2; M Moran, *Rethinking the Reasonable Person* (2003) 165.

fence is code based rather than common law.¹⁶⁰¹ These critics may indeed have a point particularly with regard to the law of negligence. Nevertheless, considering the context of the privacy tort, we will put such criticisms respectfully but firmly aside, since they may merely obscure the reason why it is reasonable to draw such an analogy in the first place.¹⁶⁰² First, it is not the plaintiff's 'fault' that she is not humiliated enough in the eyes of the law.¹⁶⁰³ Moreover, the privacy tort is not concerned with material loss or damage. It is about humiliation as a mental process and the conflict between privacy interests and freedom of speech. Apart from the conflict with speech rights, 'humiliation' can thus be seen as 'virtually the sole determinant' of the defendant's liability.¹⁶⁰⁴ Furthermore, contemporary tort theory has fostered 'understanding of how tort theory intersects with the theory of the criminal law.'¹⁶⁰⁵ Arguments which may have force with regard to the negligence tort¹⁶⁰⁶ are less convincing in a privacy context. In sum, for the purposes of this thesis it is not inappropriate per se to draw such an analogy.

The issue still merits some thought though. Considering the legal backdrop of the highly offensive to a reasonable person test, we apparently need a structure which encompasses whether the flesh-and-blood person merely has (1) an 'excitable temperament which causes him to lose his head and get "rattled"'¹⁶⁰⁷ (being highly offended) or (2) responded reasonably to a particular kind of 'offence' (being 'truly' humiliated).¹⁶⁰⁸ Therefore, we need a test which enables the courts to decide whether the dissemination

¹⁶⁰¹ The codes, however seem to be based on common law – see *Attorney General for Jersey v Holley* [2005] UKPC 23 para 3 per Lord Nicholls; *R v Rongonui* [2000] 2 NZLR 385 (CA) para 72 per Elias CJ.

¹⁶⁰² The 'code based/common law' supporters must explain the difference since the respective codes of several Commonwealth countries are based on common law and 'rather cryptic' in their codified form; hence, they require extensive interpretation – see for Canada *Re v Hill* [1986] 1 SCR 313, 342 per Wilson J; see for Australia *Stingel v Re* (1990) 97 ALR 1, 324.

¹⁶⁰³ See also N A Moreham, 'Recognising Privacy in England and New Zealand' (2004) 63(3) *Cambridge Law Journal* 555, 556 ('Not only does "offence" seem an inappropriate way to describe what is suffered by privacy claimants [...]').

¹⁶⁰⁴ See K W Simons, 'Rethinking Mental States' (1992) 72 *Boston University Law Review* 463, 500.

¹⁶⁰⁵ J Horder, 'Can the Law do without the Reasonable Person?' (2005) 55 *University of Toronto Law Journal* 253; see also P Roth, 'Unlawful Photography in Public Places: the New Zealand Position' [2006] PLPR 2 <<http://www.austlii.edu.au/au/journals/PLPR/2006/2.html>> 23 February 2007 – Roth contrasts the Court of Appeal's approach to photographs taken in public places in Hosking with the criminal law case *R v Rowe*, CA 374/04, 18 April 2005.

¹⁶⁰⁶ See R Mullender, 'The Reasonable Person, the Pursuit of Justice, and Negligence Law' (2005) 68 *Modern Law Review* 681, 690; J Horder, 'Can the Law do without the Reasonable Person?' (2005) 55 *University of Toronto Law Journal* 253, 268 for further details.

¹⁶⁰⁷ W L Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 153.

¹⁶⁰⁸ I should point out that 'excitability' is not a factor of the provocation defence - see *Stingel v Re* (1990) 97 ALR 1, 347.

of certain facts might be offensive and humiliating in some situations but not in others.¹⁶⁰⁹ The conduct of the defendant (dissemination of private facts) can be regarded as equivalent to an ‘insult,’ which causes humiliation. This humiliation is obviously what should be controlled objectively in order to determine an actionable privacy claim. In the author’s opinion, these are the general principles to be satisfied for drawing an analogy.

2.1.3.1 *The provocation defence and its similarities to the ‘highly offensive’ test*

We find these characteristics, as already indicated during the discussion of the US privacy tort,¹⁶¹⁰ in the provocation defence in criminal law (of all accessible Commonwealth countries). They are also laid down in a perhaps cumbersome way in s 169(2) Crimes Act 1961.¹⁶¹¹ The reasonable person of s 169(2)(a) Crimes Act 1961 is ‘a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender [the accused].’¹⁶¹² Substantial juridical differences to Nicholson J’s test of the privacy tort are arguably difficult to identify. The reasonable person test of the tort has to be satisfied ‘on the basis of what a reasonable person of ordinary sensibilities would feel if they were in the same position, that is, in the context of the particular circumstances.’¹⁶¹³ At least regarding the subjective-objective structure of the objective test, differences rather seem to be bogged down in semantics. The much greater emphasis on personal ‘fault’ in criminal law is, thus, a trump to be played here rather than a reason for not drawing this analogy. As an ingredient of the negligence tort, for instance, ‘negligence’ does not need to refer to a positive mental state because

¹⁶⁰⁹ See *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 68 per Panckhurst and O’Regan JJ; *Andrews v TVNZ Ltd* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 51; J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 395.

¹⁶¹⁰ See above Chapter Two, 2.5.1.1.

¹⁶¹¹ The section reads:

(2) Anything done or said may be provocation if -

- (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
- (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

¹⁶¹² *R v Rongonui* [2000] 2 NZLR 385 (CA) para 75 per Elias CJ.

¹⁶¹³ *P v D* [2000] 2 NZLR 591, 601. See also G Phillipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 196.

the emphasis lies on the defendant's conduct in a particular situation.¹⁶¹⁴ With regard to the privacy tort, the *conduct* of the *defendant* (dissemination of personal information) is related to a *positive state of mind* of the *defendant* (being highly offended). This conceptual difference distinguishes the provocation defence from the negligence test and makes it simultaneously comparable to the 'highly offensive' test of the privacy tort.¹⁶¹⁵

Furthermore, even the history of the 'reasonable person' in the law of provocation appears to include a duplication of events. In 1837, Coleridge J opined in *R v Kirkham*¹⁶¹⁶ that 'though the law condescends to human frailty' it 'considers man to be a rational being, and requires that he should exercise a reasonable control over his passions.' In the author's view, the law demands quintessentially the same from a plaintiff pleading breach of privacy. Fast-forwarding longueurs, s 169 Crimes Act 1961 replaced an entirely objective test, which developed afterwards, with a less harsh and supposedly more reasonable test.¹⁶¹⁷ Likewise, the test had been described as objective in the early stages of protecting privacy interests, followed by an understanding that subjective elements have to be acknowledged in a somewhat unspecified way.¹⁶¹⁸

Apparently, all modern defences of major Commonwealth countries are composed of two tests: (1) a test that is concerned with the characteristics of the flesh-and-blood person (the accused) in order to assess the offensive quality of the deceased's conduct; and (2) a reasonable or ordinary person test, which more or less objectively controls the level of self-control demanded by law. The reasonable person of one of the Australian provocation defences had been described as follows: 'the hypothetical ordinary person is an objective test which lays down the minimum standard of self-control

¹⁶¹⁴ K W Simons, 'Rethinking Mental States' (1992) 72 *Boston University Law Review* 463, 550.

¹⁶¹⁵ See also *ibid*, at p 477 ('Negligence and strict liability in tort law,[...], do not involve mental states in any direct way").

¹⁶¹⁶ (1837) 8 C & P 115, 119 (emphasis added) as cited in *Attorney General for Jersey v Holley* [2005] UKPC 23 para 9 per Lord Nicholls; it was only much later that provocation turned into 'something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act' - *R v Welsh* (1869) 11 Cox CC 336, 339.

¹⁶¹⁷ See *R v Rongonui* [2000] 2 NZLR 385 (CA) para 75 per Elias J for further details.

¹⁶¹⁸ See *Campbell* [2004] 2 All ER 995 (HL) para 97 per Lord Hope ('But I think that it is unrealistic to look through the eyes of a reasonable person of ordinary sensibilities at the degree of confidentiality that is to be attached to a therapy for drug addiction without relating this objective test to the particular circumstances').

required by the law.’¹⁶¹⁹ Likewise, it could be argued that the reasonable person of the privacy tort denotes the quantum of humiliation the plaintiff has to suffer without having an actionable case and thereby controls the subjectively highly offended claimant.

In the Australian case of *R v Stingel*¹⁶²⁰ the first aforementioned test of the provocation defence had been described as follows:

The central question posed by the objective test - i.e. of such a nature as to be sufficient - obviously *cannot be answered* without the *identification of the content and relevant implications* of the [...] *insult* and an objective assessment of *its gravity in the circumstances of the particular case*. Conduct [of the deceased or grievous bodily harmed] which *may in some circumstances be quite unprovocative may be intensely so in other circumstances*. Particular acts or words which may, *if viewed in isolation, be insignificant may be extremely provocative when viewed cumulatively*.

The Australian Court continued to point out, the ‘*content and extent of the provocative conduct* must be assessed from the *viewpoint of the particular accused*.’¹⁶²¹ As we recollect, the ‘internal point of view’ is also preferred in the context of the privacy tort.¹⁶²² Traditionally recognised features of the accused for the subjectivised first test include age, sex, race and physical features; the *Stingel* Court added, ‘personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult.’¹⁶²³ This, however, is akin to the acknowledgement of the context in a privacy case. *Stingel* essentially dealt with the first standard (insult),¹⁶²⁴ which had to be handled more subjectively by recognising more of the accused’s background.¹⁶²⁵

¹⁶¹⁹ *Masciantonio v Re* (1995) 183 CLR 58, 66 involving the common law defence in Victoria.

¹⁶²⁰ (1990) 171 CLR 312, 325 (emphasis added).

¹⁶²¹ Ibid, at p 326 (emphasis added); *Masciantonio v Re* (1995) 183 CLR 58, 67 (‘The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done’).

¹⁶²² See *Hosking* [2005] 1 NZLR 1 (CA) para 126 per Gault P and Blanchard J - offensiveness has to be determined objectively ‘by reference to its extent and nature.’

¹⁶²³ Ibid; these factors might include mental instability and weaknesses; see also the English case *R v Morhall* [1996] AC 90, 97 per Lord Goff (‘entire factual situation’) and *R v Rongonui* [2000] 2 NZLR 385 (CA) para 234 per Tipping J.

¹⁶²⁴ The equivalent to s 169(2)(b) Crimes Act 1961.

¹⁶²⁵ See also *R v Rongonui* [2000] 2 NZLR 385, 390 (step 3) (CA) per Tipping J.

At this point, one might gain another clue why at least the ‘highly offensive’ criterion of the privacy tort had been described as being of necessity quite subjective. The lessening of the test’s objectivity regarding the insult of the deceased was not a result of ‘experience’ or familiarity with the peculiarities of the individual accused. Instead, it is based on the underlying doctrine of provocation.¹⁶²⁶ According to Lord Hoffmann, the defence is justified because the law ‘illustrates Kant’s dictum that, from the crooked timber of humanity, nothing completely straight can be made.’¹⁶²⁷ Likewise, the emergence of privacy as a protectable interest is often attributed to the recognition of human dignity as a core value of the individual.¹⁶²⁸ Without going into too much detail at this point, the modern (at least European) concept of autonomy and dignity is often attributed to Kant.¹⁶²⁹ This will merely reassure us of being still on target for drawing an adequate analogy. Admittedly, it may sound a bit cerebral in the context of Prosser’s robust ‘congenital fool’ model, but the test of the privacy tort is, I suggest, just another attempt to make something straight out of the crooked timber of humanity.¹⁶³⁰ This attempt may thus explain further why at least a part of the objective test is of necessity quite subjective. It might indicate that ‘utility’ or ‘common sense’ is not the be-all and end-all in both areas of the law.¹⁶³¹

The second test of the provocation defence will now be addressed briefly.¹⁶³² In this respect, it has to be figured out ‘whether provocation of that degree of gravity could cause an *ordinary person* to lose self-control and act in a manner which would encompass the accused’s actions.’¹⁶³³ The provocative conduct of the deceased will be evalu-

¹⁶²⁶ The not unimportant doctrine is ‘the mercy of the law [interposing] in pity to human frailty’ – *Masciantonio v Re* (1995) 183 CLR 58, 72.

¹⁶²⁷ *R v Smith* [2001] 1 AC 146, 159 (HL).

¹⁶²⁸ See J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389-90.

¹⁶²⁹ See C E Wells, ‘Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence’ (1997) 32 *Harvard Civil Rights-Civil Liberties Law Review* 159, 165-66.

¹⁶³⁰ See *Campbell* [2004] 2 All ER 995 (HL) para 50 per Lord Hoffmann (‘What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity’) and para 56 (‘The violation of the citizen’s autonomy, dignity and self-esteem is plain and obvious’); *Brooker v Police* [2007] 3 NZLR 91 para 123 per McGrath J; N A Moreham, ‘Recognising Privacy in England and New Zealand’ (2004) 63(3) *Cambridge Law Journal* 555, 556 (‘[...] (humiliation or affront to dignity would be more appropriate terms [rather than offence])’).

¹⁶³¹ See also G C Keating, ‘Reasonableness and Rationality in Negligence Theory’ (1996) 48 *Stanford Law Review* 311, 314.

¹⁶³² The problems regarding the actual ‘reasonable person’ test will be elaborated below.

¹⁶³³ *Masciantonio v Re* (1995) 183 CLR 58, 67.

ated by considering the context whilst the suitable degree of self-control is assessed by using the ordinary or reasonable person with apparently unimpaired capabilities.¹⁶³⁴ Finally, it seems fair to deduce the following principles for the structure of the ‘highly offensive to the reasonable person’ test from the features of the provocation defence:

- whether the plaintiff is ‘*highly offended*’ by the public dissemination of private facts should be assessed in a ‘*subjectivised*’ way by considering the content of the disseminated material and the circumstances of the dissemination (including personal characteristics such as mental and physical health) in each particular case;¹⁶³⁵
- the second part of the test determines *objectively* whether the dissemination of private material in the circumstances could cause a *reasonable person* humiliation (‘truly humiliating and distressful or otherwise harmful’¹⁶³⁶) if the person were in the same position as the plaintiff.¹⁶³⁷

2.1.3.2 Problems of the provocation defence in the privacy context

From this point of view, venturing a prognosis with regard to the obstacles and final consequences of reanimating a dying concept is rather unsophisticated. The problematic part is the second sub-test. Who exactly is the objective reasonable person in the same position of the plaintiff? Are any, some or all characteristics of the flesh-and-blood plaintiff to be projected onto the reasonable person?

The provocation defence, for instance, is subject to vigorous criticism. This is because of its subjective-objective structure, which will emerge, according to the author’s prognosis, in the course of applying the test in a privacy context. Particularly the dichotomy of context-specific (for example, insult) and non-context-specific (loss of self-control) had been increasingly targeted in the law of provocation.¹⁶³⁸ It is very difficult, not only for a jury, separating out susceptibility (to be highly offended subjec-

¹⁶³⁴ See also *Green v Re* (1996-97) 191 CLR 334, 404 per Kirby J.

¹⁶³⁵ See s 169 (2)(b) Crimes Act 1961.

¹⁶³⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 126 per Gault P and Blanchard J.

¹⁶³⁷ See s 169(2)(a) Crimes Act 1961.

¹⁶³⁸ Eg, *R v Rongonui* [2000] 2 NZLR 385, 390 (CA) – per totam curiam (‘The present law is plainly unsatisfactory’); *Masciantonio v Re* (1995) 183 CLR 58, 72 (‘a curious dichotomy exists’).

tively) and reaction (being ‘truly’ humiliated objectively).¹⁶³⁹ Even if the distinction had been worked out, the test would have been ‘uneven in application.’¹⁶⁴⁰ To overcome this unevenness, it seems necessary to ‘subjectivise’ the objective element of the already subjective-objective test. What is meant by that is bridging the gap between both sub-tests with the projection of certain characteristics of the flesh-and-blood person onto the legal construct. Commonwealth jurisdictions do this to a varying degree in the context of the provocation defence. Some consider age and sex as characteristics of the reasonable person; others only age and not gender; others consider impaired intellectual function.¹⁶⁴¹ The minority in *R v Rongonui* opined that any characteristic diminishing the accused’s power of self-control in comparison with that of an ordinary person may be attributed to the objective test.¹⁶⁴² The majority, based on the imperative drafting of the Crimes Act 1961, concluded that the objective part of the test had to remain objective.¹⁶⁴³ Apparently, the test’s inconsistencies ‘could be abolished only by abolishing the “ordinary person” test itself.’¹⁶⁴⁴

However, as a matter of tort theory, the reasonable person seems to be between the devil and the deep blue sea if even the legal construct has to be regarded as being of necessity quite subjective. The difficult task with regard to the second sub-test is to ensure equality before the law (given that this is a concern) whilst maintaining an objective normative core of the objective test (given that this is a concern). As already indicated, both reasonable persons of the privacy test and the provocation defence follow the same inherent logic. Experience with the provocation defence suggests that decisions which ignore the plaintiff’s characteristics with regard to the objective reasonable

¹⁶³⁹ See *R v Rongonui* [2000] 2 NZLR 385 (CA) para 109 per Elias CJ.

¹⁶⁴⁰ See *ibid*, para 113.

¹⁶⁴¹ *Ibid*; see also *Green v Re* (1996-97) 191 CLR 334, 368 per McHugh J (‘The only qualification I would make to this statement is to add considerations of “ethnic or cultural background of the accused” to age and maturity as relevant to any inquiry into the objective standard by which the self-control of an accused is measured’); see also D M Paciocco, ‘Subjective and Objective Standards of Fault for Offences and Defences’ (1995) 59 *Saskatchewan Law Review* 271, 302-5 for further details.

¹⁶⁴² [2000] 2 NZLR 385 (CA) para 131 per Elias CJ, Thomas J concurring; based on the interpretation of s 169(2)(a) Crimes Act 1961 the ordinary man is invested ‘with the characteristics of the accused. [...] Such characteristics must extend beyond the ill-temper, irascibility, impulsiveness, violence, or intoxication an ordinary man may experience and which he is expected to keep under control’ - at para 120.

¹⁶⁴³ *R v Rongonui* [2000] 2 NZLR 385 (CA) para 235 per Tipping J.

¹⁶⁴⁴ *Masciantonio v Re* (1995) 183 CLR 58, 73.

person are likely to produce discrimination and injustice.¹⁶⁴⁵ This would be in line with the statement of US scholars that the reasonable person obliterates individual and ethnical differences regarding privacy in a heterogeneous society.¹⁶⁴⁶

Consequently, the underlying rationale of 'subjectivising' the objective part of the already mixed provocation test is equality before the law.¹⁶⁴⁷ Nevertheless, the underlying rationale cannot be 'human frailty' or 'crooked timber' of the individual as in the first sub-test. Such a rationale would deprive the test of its objective reasonableness.¹⁶⁴⁸ The feelings of a flesh-and-blood person would otherwise not be controlled by an objective standard. Hence, the appropriate justification must therefore be equality before the law. Granting equality, on the other hand, is problematic while using such a test in a bicultural (perhaps at least on the brink of being a multicultural) society with a strong Anglo-Saxon core such as New Zealand.

The problem is still the unevenness between both sub-tests. In this respect, the promise of transforming the objective provocation defence into a less harsh objective defence with subjective and objective sub-tests has been treacherous. Instead of granting equality before the law, as originally intended, this well-meaning division still caused inequality. This is to say that the predominant Anglo-Saxon societal core would rule minorities through the reasonable person as it were.¹⁶⁴⁹ In terms of stereotypes, the reserved Anglo-Saxon or Pakeha judge decides whether the hot-blooded (ie, 'excitable') Italian or Maori rightfully lost his self-control or is 'truly' humiliated. In brief, one could argue that the implementation of the subjective sub-test pictured the egalitarian concerns gaudily coloured rather than solving them. The Australian Court in *Masci-*

¹⁶⁴⁵ Ibid.

¹⁶⁴⁶ See also R P Bezanson, 'The Right to Privacy Revisited: Privacy, News, and Social Change' (1992) 80 *California Law Review* 1133, 1161-2; J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.04 at p 761; M Waterfield, 'Now You See It, Now You Don't: the Case for a Tort of Infringement of Privacy in New Zealand' (2004) 10 *Canterbury Law Review* 182, 187.

¹⁶⁴⁷ *R v Rongonui* [2000] 2 NZLR 385 (CA) para 128 ('Equality before the law is not achieved by holding those mentally damaged to the same level of culpability as those not').

¹⁶⁴⁸ See also *TVNZ Ltd v Rogers* [2007] 1 NZLR 1 (CA) para 67 per Panckhurst and O'Regan JJ – the Court opined that there has to be an 'objective overlay.'

¹⁶⁴⁹ See M Moran, *Rethinking the Reasonable Person* (2003) 210; see also H Power, 'Provocation and Culture' [2006] *Criminal Law Review* 871, 878-9.

*antonio*¹⁶⁵⁰ consequently concluded, ‘it would be much better to *abolish* the objective test of self-control in the law of provocation than to perpetuate the injustice of an “ordinary person” test that did not take into account the ethnic or cultural background of the accused.’

This is, of course, only an example of an ethnic problem. *L v G* represents a general example for the problem occurring in the privacy context. The plaintiff, a sex worker, had a sexual relationship with the defendant. The defendant took a number of sexually explicit photographs of the sex worker and had one of them published in an adult magazine. With regard to the highly offensive test, counsel for the plaintiff suggested a ‘more subjective’ objective test. He argued that ‘the reasonable woman shopper at the Timaru Pak ‘N Save supermarket [...] would be extremely unlikely to be a prostitute going about her work.’¹⁶⁵¹ This submission addresses the aforementioned unevenness between both sub-tests. It seems somewhat futile to control the subjective result of the ‘highly offensive’ criterion by using a reasonable person without any characteristics of the plaintiff. The passage also illustrates the problem of lacking inherent logic. The reasonable person simply is, *inter alia*, not a sex worker and can thereby not sensibly control whether or not a sex worker is ‘truly’ humiliated in certain circumstances.¹⁶⁵² The formidable brain teasing conundrum is what is gained, in a juridical sense, by controlling the feelings of a sex worker with the standard of the ‘reasonable woman shopper at Pak ‘N Save.’ The problem is there is no ‘distinction between a person’s susceptibility’ of being highly offended and the point at which she is ‘truly’ humiliated.¹⁶⁵³ It is logically very difficult, if possible at all, to disentangle both states of the mind and address ‘humiliation’ without the circumstances that caused a high level of offence. This, however, is precisely what, for instance, Nicholson J expected from the reasonable person of the privacy tort in *P v D*.¹⁶⁵⁴ The legal construct stands in the

¹⁶⁵⁰ *Masciantonio v Re* (1995) 183 CLR 58, 74 (emphasis added).

¹⁶⁵¹ *L v G* [2002] NZAR 495, 510. See also *Brown v Attorney-General* [2006] DCR 630 para 80 per Spear J.

¹⁶⁵² See *R v Rongonui* [2000] 1 NZLR 385 (CA) para 177 per Thomas J.

¹⁶⁵³ See *ibid*, para 179.

¹⁶⁵⁴ See also G Phillipson, ‘The ‘right’ of privacy in England and Strasbourg compared’ in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 184, 196 ([...] the reasonable person is not cloaked with the *characteristics* of the applicant, but *is* placed in the overall situation he or she is in, in order to assess their hypothetical response to publication’).

shoes of the plaintiff, but is apparently supposed to have unimpaired capabilities to withstand humiliation. This runs counter to human reality.¹⁶⁵⁵ This, it seems reasonable to suggest, indicates that both sub-tests are not separable. In *Andrews v TVNZ Ltd*, the matter was already taken quite far in this direction. Allan J opined that a court, ‘having satisfied itself that a plaintiff is a person of ordinary sensibilities, can proceed without resort to a fictitious “reasonable person”’.¹⁶⁵⁶

The majority in the House of Lords’ decision in *R v Smith*¹⁶⁵⁷ paid tribute to these inconsistencies and held that the second element of the test (loss of self-control) should be more flexible and therefore not a *fixed* standard. According to this view, the decision-making would be transferred to the jury and the jury must ask themselves whether the defendant ‘exercised the degree of self-control *to be expected of someone in his situation*’.¹⁶⁵⁸ The judgment was primarily concerned with the question as to whether the ‘loss of self-control’ standard should be ‘subjectivised’ for egalitarian reasons. As we know, the same concern could be found in the minority views of Elias CJ and Thomas J in *R v Rongonui*. This criticism, however, is akin to counsel’s submission in *L v G* to ‘subjectivise’ the reasonable person.

One might now argue that, in the context of the privacy tort, no particular drafting of an Act of Parliament restricts the courts, as was the case in provocation law.¹⁶⁵⁹ Nevertheless, the aforementioned solution would be consequent but equally doomed. Given that personal characteristics are projected onto the reasonable person, the objective test would be so thoroughly ‘subjectivised’ that it ceases to be objective.¹⁶⁶⁰ A ‘subjectivised’ objective subtest raises similar egalitarian concerns. If the plaintiff’s personal fears of, for example, being discriminated against, are projected onto the reasonable person’s capabilities to withstand humiliation, the discriminatory tendency

¹⁶⁵⁵ Ibid.

¹⁶⁵⁶ *Andrews v TVNZ Ltd* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 50.

¹⁶⁵⁷ [2001] 1 AC 146 (HL).

¹⁶⁵⁸ Ibid, at p 155 per Lord Slynn.

¹⁶⁵⁹ The findings in *R v Smith* were later held incompatible with the statutory drafting of the provocation defence; the argumentation was similar to the majority’s view in *R v Rongonui* – see *Attorney General for Jersey v Holley* [2005] UKPC 23 para 22 per Lord Nicholls.

¹⁶⁶⁰ M Moran, *Rethinking the Reasonable Person* (2003) 214; see also D M Paciocco, ‘Subjective and Objective Standards of Fault for Offences and Defences’ (1995) 59 *Saskatchewan Law Review* 271, 299.

would infect the so-called objective test. In theory, however, the reasonable person should be free of those tendencies as a matter of equality before the law.¹⁶⁶¹

Retrospectively, *P v D*¹⁶⁶² provides an illustrative example. P was a public figure, whose mental illness was about to be revealed by the media before the plaintiff successfully sought an injunction. Nowadays, it is ‘no question that the stigma once attached to mental illness is less than it was;’ rather, ‘a number of well-known New Zealanders are prepared to appear in television marketing campaigns making no secret of the fact that they have been so affected.’¹⁶⁶³ For egalitarian reasons, mental illnesses should hence not be regarded as a stigma or target for discrimination anymore. For the, say, enlightened¹⁶⁶⁴ reasonable person, it should not be offensive or humiliating anymore to be affected by such an illness – which is why well-known New Zealanders entered the public limelight and revealed their ‘handicap.’

Given that P’s *personal fear*¹⁶⁶⁵ of being discriminated against by such revelation is projected onto the reasonable person, it would be harmful to the quest for equality of the other aforementioned persons affected by such an illness. The law would treat P better and therefore unequally, because such a plaintiff might on occasion even retrieve damages for someone else’s revelation whereas others simply strive for being treated equally. If it were otherwise, being discriminated against because of a mental illness suddenly becomes ‘normal,’ ‘ordinary’ or ‘reasonable’ through the ‘subjectivised’ reasonable person. However, this is precisely what should *not* be the case objectively.¹⁶⁶⁶ While this may sound a bit airy, the general problem of a ‘subjectivised’ objective sub-test is that it suddenly lacks its normative core. In order to maintain a normative core, the judge in a *P v D* scenario must insist that the reasonable New Zea-

¹⁶⁶¹ Ibid, at p 215.

¹⁶⁶² [2000] 2 NZLR 591.

¹⁶⁶³ J F Burrows, ‘Review: Media Law’ [2004] *New Zealand Law Review* 787.

¹⁶⁶⁴ This term was used by Nicholson J in *P v D* [2000] 2 NZLR 591, 601.

¹⁶⁶⁵ Ibid, para 38. After stating he or she would be devastated by such a publication, P continued the affidavit as follows: ‘[...]I believe my [family] will be caused serious stress and harm [...]. Such is the value I put upon my privacy and my family that I would be prepared to cease [occupation] if I felt that my continued [occupation] would expose the most private and sensitive facts of my life to media exposure.... I also believe the publication would have a serious effect on my own confidence and my ability to free myself from rumour, speculation and innuendo ...].’

¹⁶⁶⁶ See *Green v R* (1996-97) 191 CLR 334, 407 per Kirby J; M Moran, *Rethinking the Reasonable Person* (2003) 215.

lander is not ‘truly’ humiliated by such a revelation (even though P might be highly offended personally).¹⁶⁶⁷ The objective test would otherwise not be a fixed objective standard. This would require precluding individuals from invoking *their own* divergent values in response to what it means to be ‘truly’ humiliated.¹⁶⁶⁸ From the perspective of the ‘objectivist,’ it ‘has to be the law, not the individual under scrutiny, [which] sets the relevant norms and values.’¹⁶⁶⁹

In the author’s respectful view, this was not the case in *P v D*. In the context of an objective test, equal treatment of citizens with mental illnesses involve that they do not retrieve damages or an injunction simply because someone disseminates information that they have a mental illness. Because it is an *objective* standard, relevant norms and values in an enlightened society demand that this is no foothold for discrimination.¹⁶⁷⁰ Nicholson J indicated that human beings are still keen to keep their personal medical treatment private although the public is generally more elucidated, ‘that disabilities such as mental illness are no cause for exclusion, scorn or embarrassment [...]’ anymore.¹⁶⁷¹ The learned Judge pointed out that this objective test is too idealistic and ‘does not take into account actual *human emotion* and the value which people place on having intimate personal information [...] private.’¹⁶⁷² This statement is undoubtedly true but it simultaneously illustrates the inappropriateness of a reasonable person standard in this context.

¹⁶⁶⁷ See M Moran, *Rethinking the Reasonable Person* (2003) 216; *TVNZ Ltd v Rogers* [2007] 1 NZLR 1 (CA) para 67 (‘The fragile sensibility of the claimant cannot prevail [...]’). See also *Green v R* (1996-97) 191 CLR 334, 408 per Kirby J.

¹⁶⁶⁸ See *ibid*, at p 234-35; see also G C Keating, ‘Reasonableness and Rationality in Negligence Theory’ (1996) 48 *Stanford Law Review* 311, 368 for the tort of negligence (‘[The reasonable person doctrine], [...], is firmly committed to objective valuation: It makes its calculations of reasonableness not by investigating the values that the persons involved in risk impositions place on the interests at stake, but by insisting that injurers assign those interests “the value which the law attaches to them” – emphasis added, internal citations omitted).

¹⁶⁶⁹ M Moran, *Rethinking the Reasonable Person* (2003) 235; see also D E Seidelson, ‘Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent’ (1981) 50 *George Washington Law Review* 17, 19 (‘The court will not permit the reasonable person standard to be supplanted by a subjective standard reflecting the litigant’s flawed judgment’).

¹⁶⁷⁰ See *Green v R* (1996-97) 191 CLR 334, 407 per Kirby J

¹⁶⁷¹ *P v D* [2000] 2 NZLR 591 para 39.

¹⁶⁷² *Ibid* (emphasis added).

Observed from the viewpoint of the media, it would nevertheless not be calculable whether the reasonable person is truly humiliated although P has indicated to the press that he or she is highly offended individually.¹⁶⁷³ Thus, it is suggested that a ‘subjectivised’ reasonable person is undoubtedly politically correct, but has merely tenuous points of contact with the pursued concept of equality before the law. The result would rather be a purely subjective test under the guise of an objective test. The alternative, as we have noted, is equally undesirable due to the unevenness between subjective and objective sub-test with corresponding egalitarian caveats. However politically incorrect the opposite may seem, the media must nevertheless prevail in a *P v D* scenario.

2.1.4 Conclusion

Prosser’s original test of the US tort seems maddeningly simple. Objectively, this is of course an inadequate statement; according to the view taken in that country, the recognition of the individual’s peculiarities would unwittingly lead to a ‘chilling effect’ on freedom of speech. New Zealand, by contrast, seemingly follows a different avenue because granting equality before the law seems to be a stronger concern. This, however, requires ‘subjectivising’ even the objective part of the test. As the law of provocation suggests, this might be a path of trials and tribulations.

In the relevant context, the reasonable person seems to be on an orderly retreat. Its application in negligence has been defended with forceful arguments whilst nobody seems to stand up for the current provocation defence. As a rule of thumb, the application of the reasonable person in negligence is easier to justify, because it focuses on the litigant’s *conduct*. It is the provocation test, however, which is similar to the relevant test of the privacy tort. The application of the reasonable person in this context may well be inappropriate due to its additional focus on the litigant’s *mental state*. It is not unreasonable to assume that Prosser also had the ‘congenital fool’ in mind when he ‘distilled’ the test as a prerequisite of the public dissemination of private facts tort. The options to treat litigants with humanity in a different legal environment seem restricted

¹⁶⁷³ This is usually a critique against a purely subjective approach – see also G C Keating, ‘Reasonableness and Rationality in Negligence Theory’ (1996) 48 *Stanford Law Review* 311, 372 (‘If actors were permitted to impose risks that were justified solely by their own subjective valuations of the ends [...], we could not reliably predict the risks to which we might legitimately be exposed in pursuing any particular cause of action’).

by the architecture of the original concept. The choices given involve discriminating against certain plaintiffs or losing the objectivity of the objective test, both of which are not appealing options. The attempt at humanising the test is hence akin to what the French call a *donquichottery*¹⁶⁷⁴. It is a noble and chivalrous fight, but one against windmills – it is difficult to be won without blurring the objective concept.

The perspective of an external prudent bystander is apparently the only arguable approach – it avoids all problems by neglecting them. That this results in a privacy tort of gesture rather than substance is ‘potluck,’ as they say in English. On a brighter note, the tort’s potential to chill freedom of speech will be marginal. At the end of the day, it is a question of what should be achieved by acknowledging the new common law rule. Given that humiliation of a human being is indeed the gist of the action,¹⁶⁷⁵ it is questionable whether the reasonable person is a sensible choice as controlling standard.

Nevertheless, to argue, by way of illustration, that particularly the ‘highly offensive’ test provides ‘adequate flexibility to accommodate the special vulnerability of children,’¹⁶⁷⁶ is in the author’s respectful view not realistic.¹⁶⁷⁷ This test offers the same flexibility to a vulnerable child as to any other individual or even social group - none whatsoever. Hence, the author supports the observation that the joint judgment does not offer a ‘coherent or workable approach’ in this respect.¹⁶⁷⁸ An explanation might be that ‘special vulnerability’, on the one hand, and ‘community mores’ or ‘reasonable persons’ on the other are stark opposites. In the context of the private facts tort, the ‘reasonable person’ does not preserve the ability of individuals ‘to develop a sense of their own autonomy.’¹⁶⁷⁹ It is the very rationale of the test to obliterate idiosyncrasies and individual autonomy for the price of predictable decisions and a tight confinement of the tort. In other words, it might be difficult to adopt US tests and avoid US re-

¹⁶⁷⁴ After the Spanish masterpiece “Don Quixote de la Mancha” by Miguel de Cervantes Saavedra.

¹⁶⁷⁵ See J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 394-5.

¹⁶⁷⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 145 per Gault P and Blanchard J.

¹⁶⁷⁷ See also K Evans, ‘Was Privacy the Winner of the Day’ [2004] *New Zealand Law Journal* 181, 182-3.

¹⁶⁷⁸ U J Cheer, ‘Privacy and the Public Interest’ (2005) 1 *Privacy Law Bulletin* 145, 147.

¹⁶⁷⁹ R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 987.

sults.¹⁶⁸⁰ Hence, it should be noted that the test would indeed confine the new common law rule very effectively. This should not be misunderstood as critique; it is a rational and consequent decision in order to achieve certain results. Common sense simply suggests that one cannot have his cake and eat it.

In brief, the test is ill-starred in the context of the new tort in the author's modest opinion. There is certainly ignorance imposed by upbringing or education involved, but this attempt to make 'something straight' out of the 'crooked timber of humanity' is most likely bound to fail. The elaboration of a new objective reasonableness standard is hence a topic that might require further dedication in a context other than this thesis.¹⁶⁸¹ The decisive point is nonetheless if the author's basic thesis is correct. It might therefore be of further interest whether an alternative approach could elaborate a different inherent logic of the test. Subsequently, we will explore whether this elaboration could be bypassed by taking the NZBoRA seriously.

2.2 Reasonable persons and human rights

With regard to the respective English law, I have suggested that the reasonable person test has been rendered superfluous, because the test can be replaced by a proportionality test. In the following paragraphs, this suggestion will be further developed. According to its perhaps most sophisticated interpretation, the reasonable person signifies Rawls' distinction between the rational and the reasonable.¹⁶⁸² Nevertheless, the previous results already point to a theoretical infirmity of test inasmuch as its premise (an equal interest of all in both liberty and security) is not met in the privacy context.

The notion of distinguishing the rational from the reasonable is nevertheless of momentous significance in the following. Prosser, by contrast, regarded the individual as a congenital fool or as being of an excitable temperament. Put mildly, this is unfamiliar parlance in a human rights context. The following paragraphs therefore include suggestions relating to the image of the human being. Our starting point is again the suggestion that privacy is predominantly an individual interest, which has to be reconciled

¹⁶⁸⁰ Compare *Hosking* [2005] 1 NZLR 1 (CA) para 146 per Gault and Blanchard J.

¹⁶⁸¹ See, eg, M Moran, *Rethinking the Reasonable Person* (2003) 274 for a suggestion.

¹⁶⁸² See above Chapter Two, 2.5.2.

with societal life. With regard to Prosser's view, one might argue that the image of the human being differs sharply from the rational individual. In the context of the American negligence tort, it has been suggested that groups of people are distinguished based on 'community experience,' which has been identified as problematic with regard to the protection of privacy. In the following, the author attempts to indicate problems which might have occurred after the common law tort is supposed to be consistent with the NZBoRA. It will be carved out that the reasonable person may occasionally conflict with the notion of treating people with equal concern and respect and occasionally with s 19 NZBoRA. In a second step, the functioning of a human rights instrument as an overarching standard of reasonableness will be sketched. We will use these issues as two levels of approximation to Tipping J's distinct approach, which, like the respective English law, omits a freestanding reasonable person test.

2.2.1 Equality before and under the law

Firstly, an overview of the reasonable person's possible philosophical background should be provided. The emergence of the reasonable person in the 19th century suggests linking it to the empiricists such as John Stuart Mill. As an enlightened thinker Mill, of course, does not use the surprisingly earthbound language of Prosser. Nevertheless, even Mill was concerned about the excitable mass. The term 'excite' can be traced back to the word mob; the term describes a group of rioters in seventeenth-century England.¹⁶⁸³ The idiom 'mob' was later used to describe disorder and helped to establish 'the "cultivated mores" of patrician culture at some distance from a plebeian culture.'¹⁶⁸⁴ The wellbeing of the latter societal group in the future, according to Mill, 'depends on the degree in which they can be made rational beings.'¹⁶⁸⁵ In other words, until they have been made rational beings it might be argued that they have to be guided by the reasonable person that embodies the 'cultivated mores' of the patricians.¹⁶⁸⁶ Nevertheless, Mill develops the concept of a modern state based on liberty rather than rights; liberty should offer inducements for 'varied experiments, and endless diversity

¹⁶⁸³ J M Roberts, 'John Stuart Mill, free speech and the public sphere: a Bakhtinian critique' in N Crossley J M Roberts (eds), *After Habermas: New Perspectives on the Public Sphere* (2004) 67, 80.

¹⁶⁸⁴ Ibid, at p 80.

¹⁶⁸⁵ Ibid, at p 81 citing J S Mill *Principles of Political Economy* (Penguin, 1985)123.

¹⁶⁸⁶ See also M Moran, *Rethinking the Reasonable Person* (2003) 158.

of experience.’¹⁶⁸⁷ In Mill’s model, as already indicated, freedom of speech is less concerned with the individual’s right to *utter* an opinion; it rather honours the freedom of all individuals to *hear* an opinion from different perspectives.¹⁶⁸⁸ However, individuals not engaged in either economics or politics exist in a ‘culture of cultivation.’¹⁶⁸⁹ They should improve and become rational beings.¹⁶⁹⁰ The state, on the other hand, remains passive and enables ‘each experimentalist to benefit by the experiment of others.’¹⁶⁹¹

What might be a possible implication for the privacy tort? The Court of Appeal applied the NZBoRA in *Hosking* to the common law sphere. Crudely put, Mill’s liberal ‘culture of cultivation’ based on liberty was confronted with a ‘culture of justification’ based on rights. In Kantian thought, for instance, human beings have dignity and autonomy.¹⁶⁹² In a nutshell, the essence of granting individual rights is based on the assumption that the individual is rational.¹⁶⁹³ Kantian rights, by way of illustration, ordinarily form an overarching instrument of universal morals, deriving from the free and rational will.¹⁶⁹⁴ An essential part of these morals is equal treatment before and under the law.¹⁶⁹⁵ In a ‘constitutionalised’ common law, equality derives its force from two relevant sources: at its core, it means that people are to be treated with equal concern and respect; further norms of equality, such as the non-discrimination clause in s 19

¹⁶⁸⁷ J M Roberts, ‘John Stuart Mill, free speech and the public sphere: a Bakhtinian critique’ in N Crossley J M Roberts (eds), *After Habermas: New Perspectives on the Public Sphere* (2004) 67, 83 citing J S Mill ‘On Liberty’ in J Grey (ed), *John Stuart Mill on Liberty* (OUP, 1998) 121 (emphasis added).

¹⁶⁸⁸ Ibid, at p 78. See also M Markin, ‘An “Unholy Alliance”: The Law of Media Ride-Alongs’ (2004) 12 *CommLaw Conspectus* 33, 34, D A Strauss, ‘Rights and the System of Freedom of Expression’ [1993] *University of Chicago Legal Forum* 197, 198; J J Ofseier ‘Talking Liberty with John Stuart Mill’ [1999] *Annual Survey of American Law* 395, 410.

¹⁶⁸⁹ Ibid, at p 84.

¹⁶⁹⁰ The individual apparently merely has the freedom to perform acts that do not affect the interests of others. Mill calls these actions “self-regarding”; this however is the freedom ‘from legislative or other governmental interference in behaviour that does not harm nonconsenting others’ – see J Wagner De-Cew, ‘The Scope of Privacy in Law and Ethics’ (1986) 5 *Law and Philosophy* 145, 163-4 (emphasis added).

¹⁶⁹¹ J M Roberts, ‘John Stuart Mill, free speech and the public sphere: a Bakhtinian critique’ in N Crossley J M Roberts (eds), *After Habermas: New Perspectives on the Public Sphere* (2004) 67, 83 citing J S Mill ‘On Liberty’ in J Grey (ed) *John Stuart Mill on Liberty* (OUP, 1998) 121.

¹⁶⁹² See C S Dailey, ‘Holmes and the Romantic Mind’ (1998) 48 *Duke Law Journal* 429, 488.

¹⁶⁹³ A Reath, *Agency & Autonomy in Kant’s Moral Theory* (2006) 92. See also E J Eberle, ‘Human Dignity, Privacy, and Personality in German and American Constitutional Law’ [1997] *Utah Law Review* 963, 973.

¹⁶⁹⁴ Ibid, at p 99 citing I Kant, *Groundworks II* (G 4: 431).

¹⁶⁹⁵ Eg, art 26 ICCPR. For the privacy context see generally C Fried, ‘Privacy’ (1968) 77 *Yale Law Journal* 475, 478

NZBoRA,¹⁶⁹⁶ may be regarded as derived from the claim of equality of status.¹⁶⁹⁷ However, we can take it as axiomatic that every person has to be treated at least with equal concern and respect in a generally applicable law. Moreover, different treatment of genders, ethnicities etcetera would require sufficient justification pursuant to s 5.¹⁶⁹⁸ Section 19, which is of the same importance as freedom of speech,¹⁶⁹⁹ could be turned (horizontally applied) against the court where applicable. Given that the privacy tort has to be consistent with the NZBoRA, it is suggested that the courts do not only have to keep s 14 firmly in mind in this context.¹⁷⁰⁰

In order to portray the treatment of each person with equal concern and respect, we need to invoke an exemplary subject of the law who is not necessarily an ‘ordinary’ reasonable person. I refer to this person as ‘Catweazle fella.’ This was not said flip-pantly, but should illustrate that some people may be difficult to fathom with common sense and, say, community experience.¹⁷⁰¹ In other words, whether or not the judge could approach such a person with common sense is irrelevant, because the person should be treated with equal concern and respect in any case.¹⁷⁰² Kant’s categorical imperative, for instance, would demand ‘do treat the Catweazle fella equally’ and not ‘treat the litigant equally unless he is a Catweazle fella.’¹⁷⁰³ In the former category, the judge treats the person equally, because the judge herself wants to be the first subject of such a law. The latter attitude, however, seems to be the maxim of contemporary tort law insofar as only ‘normal’ or ‘ordinary’ people are subject to experience. Nevertheless, equality norms have been described as one of the cornerstones of democratic so-

¹⁶⁹⁶ The NZBoRA does include equality rights ‘at least in the sense of a right not to be discriminated against’ - P Rishworth, ‘Lord Cooke and the Bill of Rights’ in Rishworth, P (ed), *The Struggle for simplicity in the law* (1997) 323; see also D R Knight, ‘“I’m Not Gay - Not That There’s Anything Wrong with That!”: Are Unwanted Imputations of Gayness Defamatory?’ (2006) 37 *Victoria University of Wellington Law Review* 249, 272.

¹⁶⁹⁷ See generally ‘Egalitarianism’ in Stanford Encyclopaedia of Philosophy, <<http://plato.stanford.edu/entries/egalitarianism/>> 08 March 2008. See also art 26 ICCPR and Lord Steyn, ‘Democracy through Law’ [2002] *European Human Rights Law Review* 723, 731-2.

¹⁶⁹⁸ P A Joseph, *Constitutional and Administrative law in New Zealand* (3rd ed, 2007) para 27.4.2 at p 1145.

¹⁶⁹⁹ S Mize, ‘Resolving Cases of Conflicting Rights under the New Zealand Bill of Rights Act’ (2006) 22 *New Zealand Universities Law Review* 50, 71 fn 72.

¹⁷⁰⁰ This, however, seems to be the dominant view - see, eg, J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 391.

¹⁷⁰¹ It might be advantageous to picture the great Geoffrey Bayldon in this role.

¹⁷⁰² See also C Fried, ‘Privacy’ (1968) 77 *Yale Law Journal* 475, 478.

¹⁷⁰³ See generally A Reath, *Agency & Autonomy in Kant’s Moral Theory* (2006) 99.

cieties because it values persons as being worthy of dignity and respect.¹⁷⁰⁴ The common law occasionally discriminates against citizens on grounds such as age, sex and so on, which is why Parliament responded with a patchwork of statutes to reverse these tendencies.¹⁷⁰⁵ It should be indicated, in conclusion, that traditional maxims might collide with those of the NZBoRA once the Act has been held applicable to the common law.

Having said that, the ‘collision’ should be briefly illustrated by using *Brown v Attorney General of New Zealand*¹⁷⁰⁶ as an example. The plaintiff was a convicted paedophile trying to reintegrate into society. Spear J stated that ‘[t]he [highly offensive to a reasonable person] test of course is not for the *reasonable paedophile* but of a *reasonable person* in the shoes of a person that the publication is about.’¹⁷⁰⁷ Why is that? I have already suggested that the reasonable person in *Campbell* was a ‘reasonable drug addict receiving treatment.’ A compelling legal difference to a ‘reasonable paedophile’ is difficult to identify. In English provocation law, the test has produced ‘monsters like the reasonable obsessive, the reasonable depressive alcoholic and even [...] the reasonable glue sniffer.’¹⁷⁰⁸ Spear J, however, continued by stating that he was ‘just able to find that an objective reasonable person standing in the shoes of the plaintiff should be highly offended by the publication of that information about that plaintiff.’¹⁷⁰⁹

Here we meet the problem of lacking experience with the idiosyncrasies of the litigant again. The decision in *Brown* seems to be influenced by the fact that a child abuser is understandably difficult to grasp with common sense. A child abuser is ‘abnormal’ whilst the yardstick of the common law is, as we know, ‘normality’ or ‘ordinariness.’ Being a child abuser is an idiosyncrasy of the plaintiff that is not featured by the characteristics of a reasonable person. Similar to the situation of a mentally disabled

¹⁷⁰⁴ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 17.4.1; see also C L’Heureux-Dubé, ‘Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective’ (2003) 1 *International Journal of Constitutional Law* 35, 53.

¹⁷⁰⁵ *Ibid*, para 17.7.1.

¹⁷⁰⁶ [2006] DCR 630.

¹⁷⁰⁷ *Ibid*, para 81 (emphasis added).

¹⁷⁰⁸ *R v Smith* [2001] 1 AC 146, 172 (HL) per Lord Hoffmann.

¹⁷⁰⁹ *Ibid* (emphasis added).

person in the law of negligence,¹⁷¹⁰ he was therefore subject to the utmost objectivity. Nevertheless, the problem is that even Mr Brown as child abuser had to be treated with equal concern and respect. In New Zealand, the common law was already able to deal with the legal construct of a ‘reasonable public figure with mental health issues’ in *P v D*. If it were otherwise, Nicholson J would have dismissed the application. It seems reasonable to suggest that the same ‘subjectivised’ test has to be applied to the plaintiff in *Brown*. This would in turn require us to become acquainted with the ‘reasonable child abuser reintegrating into society.’ Surely, a principled application of the test would inexorably lead to the realm of the absurd, but this is no valid reason not to treat the litigant with the same respect as others.¹⁷¹¹ Thus, it does not seem to be easy reconciling the current model based on liberty with individual rights. Rawls is certainly right in observing that utilitarianism is unable to maintain ‘separateness of persons’ due to the general welfare pursued instead.¹⁷¹² The yardstick of human rights instruments is grounded in human dignity; a rational being ‘obeys no law other than that which he himself at the same time gives.’¹⁷¹³ Some might thus argue, ‘that justice without equality is no justice at all.’¹⁷¹⁴

To briefly explain German law, ensuring equality in all areas of the law was a major driving force in constitutionalising private law. Its origin can be traced back to a scholarly article dealing with the problem that women did not receive equal payment for equal work.¹⁷¹⁵ This was followed only much later by the *Lüth*¹⁷¹⁶ decision of the

¹⁷¹⁰ See above Chapter Three, 2.1.2.

¹⁷¹¹ See generally P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 17.9.8.

¹⁷¹² J Rawls, *A Theory of Justice* (OUP, 1971) 26. The underlying conflict is basically concerned with two different interpretations of social equality – C Bird, *The Myth of Liberal Individualism* (1999) 74; see also J Raz, *The Morality of Freedom* (OUP, 1986) 271 for a more detailed discussion.

¹⁷¹³ I Kant, *Groundworks II* (G 4: 433, 434) cited in A Reath, *Agency & Autonomy in Kant’s Moral Theory* (2006) 92; see also C Fried, ‘Privacy’ (1968) 77 *Yale Law Journal* 475, 479; G C Keating, ‘Reasonableness and Rationality in Negligence Theory’ (1996) 48 *Stanford Law Review* 311, 318.

¹⁷¹⁴ C L’Heureux-Dubé, ‘Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective’ (2003) 1 *International Journal of Constitutional Law* 35, 55.

¹⁷¹⁵ B S Markesinis and S Enchelmaier, ‘Human Rights under German Constitutional Law’ in B S Markesinis (ed), *Protecting Privacy* (1999) 191, 196; see also K M Lewin, ‘The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany’ (1968) 17(3) *International Comparative Law Quarterly* 571, 583.

¹⁷¹⁶ BVerfGE 7, 198 (1958); see also K M Lewin, ‘The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany’ (1968) 17(3) *International Comparative Law Quarterly* 571, 587-8.

German Federal Constitutional Court and the edifice of the private law, as it stood, began to crumble. This is decidedly not saying that the same decisions have to be made in New Zealand. Nevertheless, the joint judgment in *Hosking* applied the NZBoRA to a private dispute and - nothing happened. This, at least, is not enough in my view.

Suffice to say that the reasonable person is in conflict with a human rights instrument generally and occasionally with s 19. New Zealand's non-discrimination right is a great deal more protective in comparison to the 14th Amendment to the US Constitution.¹⁷¹⁷ In the author's view, a test is not consistent with the NZBoRA just because it is used in the USA. Furthermore, the USA is one of the few jurisdictions not taking part in the modern international dialogue concerned with the right to be free from discrimination.¹⁷¹⁸ 'Constitutionalisation' of the private law without any idealism might be a quite anaemic procedure if it does not bring about any changes; this would be a constitutionalisation without a cause. In sum, it is suggested that their Honours' standard may occasionally conflict with the NZBoRA on grounds of equality.

2.2.2 *The NZBoRA as a standard of reasonableness*

One might ask now how a human rights instrument could supplant a reasonableness standard and that would be a splendid question indeed. Simply granting equality is honourable but certainly does not provide a fully fledged standard. Rather, it seems necessary to accept that the problem hiding in the background of the equality debate is 'discretion.'¹⁷¹⁹ We have noted that the courts primarily consider the context of the case and deliver moral decisions based on impression.¹⁷²⁰ The decision in *Brown* provides a good example, because Spear J held that an objective reasonable person *should* (or ought to be) highly offended under the circumstances.¹⁷²¹ Moreover, the BSA's experience with the test suggests that a series of decisions has no apparent linking rationale

¹⁷¹⁷ See C L'Heureux-Dubé, 'Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective' (2003) 1 *International Journal of Constitutional Law* 35, 35 for a comparison between Canadian and US equality rights; see also G C Keating, 'Reasonableness and Rationality in Negligence Theory' (1996) 48 *Stanford Law Review* 311, 320.

¹⁷¹⁸ Ibid.

¹⁷¹⁹ M Moran, *Rethinking the Reasonable Person* (2003) 281.

¹⁷²⁰ See also P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 13.16.5 ('In this area, like in other areas involving limits on freedom of expression, Judges tend to evaluate the facts of the particular case').

¹⁷²¹ *Brown v Attorney General of New Zealand* [2006] DCR 630 para 81.

apart from recognising the context of each case.¹⁷²² In the light of these circumstances, one could also argue that the current interpretation of the reasonable person simply provides discretionary space for the courts. In brief, the test does not lead to useful precedential authority as arguably intended by the historical introduction of the test to the common law.

With regard to New Zealand's privacy tort, one can admittedly only hear the echo of this 'call to context'¹⁷²³ rather than the call itself - we merely meet the notion of paying regard to the particular facts of the case in virtually every test.¹⁷²⁴ Nevertheless, one possible response is to connect the operation of the common law closer to an overarching legal system, which is usually a human rights instrument.¹⁷²⁵ The idea of connecting a moral decision (which has to be made in practice anyway) to the overarching morals perpetuated by the NZBoRA makes sound sense to this writer. Indeed, Richard Mullender observed parallels to the discussion in the UK regarding the horizontal effect of the HRA in this context.¹⁷²⁶ As Mayo Moran observes, the idea has received little attention so far, but the 'question of the influence of constitutional norms is beginning to receive serious attention as constitutionalism becomes more expansive.'¹⁷²⁷

In New Zealand, quasi-constitutionalism became theoretically more expansive since *Hosking*. As I have sought to show, the NZBoRA rules out maxims such as unequal treatment in the name of general welfare as well. In England, the quasi-constitutional HRA established some 'fundamental requirements of distributive justice' in the context of the extended breach of confidence action.¹⁷²⁸ The NZBoRA, contrary to the suggestion of the joint judgment, is in my view not taking part in this distribution process however. The concept of distributive justice, as we know, is part of the famous

¹⁷²² U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 262.

¹⁷²³ M Moran, *Rethinking the Reasonable Person* (2003) 282.

¹⁷²⁴ See also J Lenow, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235, 246 (Lenow observes with regard to the US law that '[t]he private facts tort is *highly fact-sensitive* and requires the application of principles that are somewhat vague and not easily defined or applied' - emphasis added).

¹⁷²⁵ See R Mullender, 'The Reasonable Person, The Pursuit of Justice, and Negligence Law' (2005) 68(4) *Modern Law Review* 681, 686.

¹⁷²⁶ *Ibid.*

¹⁷²⁷ M Moran, *Rethinking the Reasonable Person* (2003) 283.

¹⁷²⁸ See R Mullender, 'The Reasonable Person, The Pursuit of Justice, and Negligence Law' (2005) 68(4) *Modern Law Review* 681, 686.

Aristotelian concept of justice and has to be distinguished from corrective justice.¹⁷²⁹ According to Peter Cane, tort law in general can be described as a ‘set of rules and principles of personal responsibility, the main function of which is to justify the imposition of obligations to repair harm.’¹⁷³⁰ ‘Justification’ and ‘personal responsibility’ for one’s freedom of choice are also major themes of modern human rights instruments.¹⁷³¹ The NZBoRA, it seems reasonable to suggest, could therefore be utilised for present purposes. However, the importance of the role of distributive justice within tort rules is not fully clarified yet; the reason is most likely that the relevant literature is pitched at a high level of abstraction.¹⁷³² A resolution of this issue is outside the scope of this analysis, but the role of distributive justice in tort theory is nonetheless an important point. English law, as we know, can be interpreted as incorporating a mixed conception of corrective justice – both forms of justice are therefore relevant in this context.¹⁷³³ The most important detail about distributive justice that needs to be recalled is that its principle is ‘proportionality.’¹⁷³⁴

Be that as it may, Tom Garety was able to observe that connecting the law to a higher value system ‘alone promises to bring together perspectives upon both the normative and descriptive of a right such as privacy.’¹⁷³⁵ In a truly constitutionalised privacy tort, harmonised with such a higher value system, the reasonable person is superfluous. Firstly, only a ‘*reasonable* expectation of privacy’ is actionable. Second and more importantly, relevant privacy interests are appropriate merely if they represent *reasonable* limits on freedom of speech.¹⁷³⁶ Both tests offer room for discretionary and

¹⁷²⁹ See P Cane, ‘Distributive Justice and Tort Law’ [2001] *New Zealand Law Review* 401, 405-7; see also his ‘The Anatomy of Private Law Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 203, 215. Refer to Chapter Two, 2.3.3.2 for a brief discussion.

¹⁷³⁰ Ibid, at p 403 (emphasis added).

¹⁷³¹ Eg, W Brugger, ‘The Image of the Person in the Human Rights Concept’ (1996) 18 (3) *Human Rights Quarterly* 594, 603.

¹⁷³² P Cane, ‘Distributive Justice and Tort Law’ [2001] *New Zealand Law Review* 401, 419.

¹⁷³³ See above Chapter Two, 2.3.3.3.

¹⁷³⁴ See above Chapter Two, 2.3.3.2.

¹⁷³⁵ T Garety, ‘Redefining Privacy’ (1977) 12 *Harvard Civil Rights-Civil Law Review* 233, 239 (emphasis added). He also argues, ‘[f]or with time, definitions must yield to realities just as precedents must yield to ideals.’ See also J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 381.

¹⁷³⁶ See also *von Hannover v Germany* (2005) 40 EHRR 1 per Mr Justice Zupančič (‘The “reasonable-ness” of the expectation of privacy could be reduced to the aforementioned balancing test’); *Campbell* [2004] 2 All ER 995 (HL) paras 21, 22 per Lord Nicholls; *McKennitt* [2006] EMLR 178 (QB) para 58

at the same time normative decisions. One could argue that these two tests suffice to control even a purely subjective ‘highly offensive’ test – without an additional reasonable person.¹⁷³⁷

The second aforementioned reasonableness standard stems from the NZBoRA. Mullender envisages difficulties given that two incommensurable objective values have to be ranked which cannot be measured on a common scale.¹⁷³⁸ Here we have to differentiate again between negligence (where these arguments are forceful) and the relevant law concerning privacy. With regard to the reconciliation of privacy and freedom of speech, the gravity of the argument from incommensurability is at least diminished. The notion of ‘incommensurability’ touches upon the problem of whether a balancing exercise could follow rational principles as distinct from producing purely subjective results.¹⁷³⁹ Alexy answers the question in the affirmative but concedes ‘[i]f balancing or weighing were incompatible with correctness, objectivity, and justification, it would have no place in constitutional law.’¹⁷⁴⁰ For our more practical purposes, discretion (or if you want, ‘ranking’ of both principles) is guided by the proportionality test, which is ordinarily composed of three or four sub-tests.¹⁷⁴¹ John Alder argues forcefully that proportionality is primarily a non-rational evaluation and thus ‘an expressive matter as to what kind of society we wish to be;’ Alder concedes for his part, however, that ‘Alexy makes strong claims for the rationality of a multi-factorial cost-benefit balanc-

per Eady J; T A Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 943, 962.

¹⁷³⁷ See also N A Moreham, ‘Recognising Privacy in England and New Zealand’ (2004) 63(3) *Cambridge Law Journal* 555, 556; R Wacks in R Wacks (ed), *Privacy Volume I* (International Library of Essays in Law & Legal Theory) (1993), xvii – Introduction.

¹⁷³⁸ R Mullender, ‘The Reasonable Person, The Pursuit of Justice, and Negligence Law’ (2005) 68(4) *Modern Law Review* 681, 687. The notion of the incommensurability was particularly embraced by Isaiah Berlin. ‘Incommensurability means that, where there are clashes of value, although any given accommodation may be rationally defensible in itself, we cannot rationally compare and rank competing accommodations’ - J Alder, ‘The Sublime and the Beautiful: Incommensurability and Human Rights’ [2006] *Public Law* 697, 698.

¹⁷³⁹ Eg, J Habermas, *Between Facts and Norms* (W Rehg trans, Cambridge, Massachusetts, 1996) 259.

¹⁷⁴⁰ R Alexy, ‘Balancing, Constitutional Review, and Representation’ (2005) 3 *International Journal of Constitutional Law* 572, 574.

¹⁷⁴¹ See J Alder, ‘The Sublime and the Beautiful: Incommensurability and Human Rights’ [2006] *Public Law* 697, 699. See also T Garety, ‘Redefining Privacy’ (1977) 12 *Harvard Civil Rights-Civil Law Review* 233, 238 – Garety describes the difficulties in defining privacy and addresses a middle ground between abstract philosophical and concrete legal applications. He names the ‘principles of law’ such as liberty, fairness and so on ‘undergirding the legal system as whole’ that ‘mediate between the legal rules of decision for every case and the political concepts.’

ing exercise based on proportionality.’¹⁷⁴² Although it is indeed an important issue with strong arguments on both sides, a more elaborated discussion would be outside the scope of this thesis. Alexy’s account is practical and thus preferable in this context; critics raise predominantly philosophical objections. Moreover, an alternative practical approach is not identifiable. As Kumm points out, ‘there is no other structural account [than proportionality balancing] available to capture better the liberal idea of rights-based justice.’¹⁷⁴³

It is important to note that discretion is not taken away from the judge, but it is not boundless.¹⁷⁴⁴ The values of a higher ‘constitutional’ order (such as ss 5, 14, 19) ‘both positively shape and constrain’ the judge’s reasoning if she determines limits on freedom of speech.¹⁷⁴⁵ Lamer CJC described the impact of the Canadian Charter on discretionary decisions of the common law by suggesting that

[a] common-law rule conferring discretion cannot confer the power to infringe the Charter. Discretion must be exercised within the boundaries set by the principles of the Charter; exceeding results in a reversible error of law.¹⁷⁴⁶

A ‘Catweazle fella,’ as our exemplary subject of the law, is not discriminated against because he is abnormal. However, he might additionally be a public figure or has courted public attention in the past.¹⁷⁴⁷ This may weigh to his disadvantage in a principled balancing exercise. At this point, it should be reiterated that distributive justice is concerned with the distribution of burdens and benefits based on merit.¹⁷⁴⁸ The privacy claim of public figure is less meritorious as it were. Therefore, he could and should be treated differently in comparison to other individuals (for example, a private

¹⁷⁴² J Alder, ‘The Sublime and the Beautiful: Incommensurability and Human Rights’ [2006] *Public Law* 697, 699.

¹⁷⁴³ See also M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 592.

¹⁷⁴⁴ For such a view see E W Thomas, *The Judicial Process* (2005) 202.

¹⁷⁴⁵ See M Moran, *Rethinking the Reasonable Person* (2003) 284.

¹⁷⁴⁶ *Dagenais v Canadian Broadcasting Corp*, (1994) 120 DLR (4th) 12, 36 (SCC). It is intriguing that Lamer CJC also attributes personal characteristics of the accused to the ‘reasonable person’ in criminal law cases - see D M Paciocco, ‘Subjective and Objective Standards of Fault for Offences and Defences’ (1995) 59 *Saskatchewan Law Review* 271, 283.

¹⁷⁴⁷ See also *His Royal Highness the Prince of Wales v Associated Newspapers Ltd* [2008] EMLR 66 (Ch) paras 103-110 per Blackburne J; *Campbell* [2004] 2 All ER 995 (HL) para 54 per Lord Hoffmann.

¹⁷⁴⁸ See above Chapter Two, 2.3.3.2.

person) because of his own actions. The individual is in the driving seat – for richer, for poorer. This, however, is not discrimination but a justified differentiation in the light of a human rights instrument (most notably s 5). Moreover, ignoring these differences of the individual plaintiff would place an unreasonable, that is, disproportionate limit on freedom of speech.

It should be reiterated that the delineation of the privacy interest is best separated from subsequent considerations concerned with freedom of speech or the public interest.¹⁷⁴⁹ In *Andrews v TVNZ Ltd*,¹⁷⁵⁰ Allan J pointed out that ‘[t]he ultimate outcome of the [*Campbell*] case turned upon an assessment of reasonableness.’¹⁷⁵¹ The aforementioned ‘reasonableness’ (whether Ms Campbell may prevail even though she has courted public attention extensively) was determined through the application of the proportionality test however.¹⁷⁵² The fact that Ms Campbell is a public figure, in contrast, had only minor impact on the ‘reasonable expectation of privacy’ test.¹⁷⁵³

Nevertheless, the contemporary English approach could be regarded as advantageous if juxtaposed to the moral reasoning of the ‘pre-reasonable person’ era of the, *inter alia*, 18th century. Given that the two-step limitation process pursuant to ss 5, 14 is carried out properly, it is possible to restructure the exercise of discretion, for instance,

¹⁷⁴⁹ See above Chapter Two, 2.5.2.

¹⁷⁵⁰ High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 36.

¹⁷⁵¹ *Ibid* (emphasis added).

¹⁷⁵² *Campbell* [2004] 2 All ER 995 (HL) para 36 per Lord Hoffmann. His Lordship pointed out that the importance of the case centred on the principles, with ‘which the law should strike a balance between the right to privacy and the right to freedom of expression, on which the House is unanimous.’ Lord Hoffmann continued by mentioning, ‘[w]hat is said to make this case different is, first, that Ms Campbell is a *public figure* who has sought publicity about various aspects of her private life and secondly, that the aspects of her private life which she has publicised include her use of drugs, in respect of which she has made a false claim. The Mirror claims that on these grounds it was entitled in the public interest to publish the information and photographs and that its right to do so is protected by art 10 of the convention’ – at para 54 (emphasis added). The learned Judge continued, ‘[o]ne must therefore proceed to consider the grounds why the Mirror say there was a *public interest* in its publication of information about Ms Campbell which it would not have been *justified* in publishing about someone else. First, there is the fact that she is a public figure who has had a long and symbiotic relationship with the media. In my opinion, that would not in itself *justify* publication’ – at para 57 (emphasis added).

¹⁷⁵³ Compare *Andrews v TVNZ* High Court Auckland, CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) paras 23-35; see also *von Hannover v Germany* (2005) 40 EHRR 1 per Mr Justice Zupančič (‘Of course, one must avoid circular reasoning here. The “*reasonableness*” of the expectation of privacy could be reduced to the *aforementioned balancing test*’ – emphasis added); *McKennitt* [2007] 3 WLR 194 (CA) para 11 per Buxton LJ; *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) para 45 per Blackburne J.

on appeal.¹⁷⁵⁴ In the context of the current ‘reasonable person’, by contrast, it can ‘often be difficult to give detailed reasons for one’s judgment.’¹⁷⁵⁵ It should be noted, however, that this could happen with a poorly applied proportionality test as well. At last, Tipping J’s approach will be addressed.

2.2.3 Tipping J’s distinct approach

Tipping J’s approach, as already suggested, differs from the joint judgment in many respects. One scholar regretted that the majority in *Hosking* did not bring clarity regarding the appropriate level of offence. Instead, further litigation and litigation expense might be required to determine whether the difference ‘amounts to anything more than a verbal quibble.’¹⁷⁵⁶ This concern is barely justified because it presupposes that the courts would regard his Honour’s opinion as a valid option. Significant decisions in the wake of *Hosking*, however, did not echo or even mention Tipping J’s proposal.¹⁷⁵⁷

Evans is right in stating that the ‘reasonable expectation of privacy’ and the ‘highly offensive’ test ‘coincide and are adequately summed up by the ‘reasonable expectations’ phrase.’¹⁷⁵⁸ Tipping J advocated a ‘substantial level of offence rather than a high level of offence.’¹⁷⁵⁹ His Honour argued that the level of offence should be controlled within the ‘reasonable expectation of privacy’ test.¹⁷⁶⁰ The latter test of the privacy tort ‘controls the subjective expectation of the individual.’¹⁷⁶¹ The plaintiff has to show that her expectation of privacy is a reasonable one.¹⁷⁶² By determining the reasonableness of the claim, the ‘Court has to make a *value judgment*.’¹⁷⁶³ There is, thus, no need for an additional ‘reasonable person’ test. In *Andrews v TVNZ*¹⁷⁶⁴ the High

¹⁷⁵⁴ See M Moran, *Rethinking the Reasonable Person* (2003) 285.

¹⁷⁵⁵ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 395.

¹⁷⁵⁶ A Geddis, ‘Hosking v Runtig: A privacy tort for New Zealand’ (2005) 13 *Tort Law Review* 5, 10.

¹⁷⁵⁷ See, eg, *Rogers v TVNZ Ltd* [2007] 1 NZLR 156 (CA) paras 59-69.

¹⁷⁵⁸ K Evans, ‘Was Privacy the Winner of the Day’ [2004] *New Zealand Law Journal* 181, 184; see also N A Moreham, ‘Recognising Privacy in England and New Zealand’ (2004) 63(3) *Cambridge Law Journal* 555, 556.

¹⁷⁵⁹ *Hosking* [2005] 1 NZLR 1 (CA) para 256.

¹⁷⁶⁰ *Ibid.*

¹⁷⁶¹ *Ibid.*, para 250 (emphasis added).

¹⁷⁶² *Ibid.*

¹⁷⁶³ *Ibid.* (emphasis added).

¹⁷⁶⁴ *Andrews v TVNZ* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 67.

Court applied the ‘highly offensive’ test but conceded that ‘there may be cases in which a reasonable expectation of privacy, and that high degree of offence, will amount to one and the same thing’ and these cases might even be in the majority.

Tipping J’s approach is preferable, particularly if we revisit the joint judgments’ justification for a freestanding ‘reasonable person’ test. It is fair to say that the joint judgment has no identifiable concept as to whether the tort’s first test requires a ‘private fact’ or a ‘reasonable expectation of privacy.’ Therefore, their Honours deemed it unrealistic to contemplate ‘legal liability for all publication of all private information.’¹⁷⁶⁵ Nevertheless, if it had been clear that the first limb requires a ‘reasonable expectation of privacy’ it would be transparent that legal liability would not be imposed with regard to ‘all publication of all private information.’ The requirement that not *all* but merely *reasonable* expectations are actionable would have no (logical) function if it were otherwise. Their Honours continued justifying an additional reasonable person test by mentioning that ‘[i]t would be absurd, for example, to consider merely actionable informing a neighbour that one’s spouse has a cold.’¹⁷⁶⁶ This argument is rather in the ‘Prosser/Holmes’ category because it presupposes an individual with poor judgment capabilities rather than a rational agent. We therefore meet the conflict between the two conflicting outlooks on human nature again.

Nevertheless, the joint judgment has addressed an important point with regard to a rights-based model: ‘how to motivate the subject to act rationally, when acting rationally means self-regulation, that is, acting against your own inclinations and desires.’¹⁷⁶⁷ This is indeed quite problematic. If the individual is empowered with, say, a ‘right to privacy,’ what should stop her from invoking it in a ‘one’s spouse has a cold’ scenario? Habermas proposes that the individual must meet the needs of living in a free society halfway; there has to be a ‘modicum of congruence between morality and the practises of socialisation and education.’¹⁷⁶⁸ Rawls indicated a similar view; his individual, pur-

¹⁷⁶⁵ *Hosking* [2005] 1 NZLR 1 (CA) para 125.

¹⁷⁶⁶ *Ibid.*

¹⁷⁶⁷ K Hirschkop, ‘Justice and Drama: on Bakhtin as a complement to Habermas’ in N Crossley and M Roberts (eds) *After Habermas: New Perspectives on the public Sphere* (2004) 49, 63.

¹⁷⁶⁸ *Ibid.*, citing J Habermas, ‘Morality and Ethical Life: Does Hegel’s Critique of Kant apply to Discourse Ethics?’ in *Moral Consciousness and Communicative Action* (Cambridge, Mass: MIT Press 1990) 208-9;

suing an individually chosen plan of life, faces the same societal restrictions.¹⁷⁶⁹ Granting qualified rights to the individual seems to go hand in hand with some demands as to how the individual has to function in the public sphere. A certain confidence in the individual's ability to integrate into society is demanded after granting individual rights. Rawls argued in his later work to distinguish between the rational and the reasonable.¹⁷⁷⁰ Merely rational agents, says Rawls, 'lack a sense of justice and fail to recogni[s]e the independent validity of the claims of others.'¹⁷⁷¹ This distinction, as we know, has also been made in the context of the reasonable person in tort law.¹⁷⁷² To this writer, the respective image is important to understand the conflict of 'private' and 'public interests.' Furthermore, it might be instructive as to how the balance is finally struck.

How could the distinction between the rational and the reasonable be drawn in the context of qualified (quasi-)constitutional rights? The German Federal Constitutional Court, merely as an example,¹⁷⁷³ suggests the following:¹⁷⁷⁴

The image of the human person that underlies the Basic Law [the German Constitution] is not the isolated individual. Instead, the Basic Law has solved the tension between the individual and

the passage reads as follows: '[t]his much is true: any universalistic morality is dependent upon a form of life that meets at half way. There has to be a modicum of congruence between morality and the practices of socialisation and education. The latter must promote the requisite internalization of superego controls and the abstractness of ego identities. In addition, there must be a modicum of fit between morality and socio-political institutions. Not just any institutions will do. Morality thrives only in an environment in which post-conventional ideas about law and morality have already been institutionalised to a certain extent.'

¹⁷⁶⁹ J Rawls, *A Theory of Justice* (OUP, 1971) 6, who notes that life plans of individuals have to be 'fitted together so that their activities are compatible with one another.' See also C Bird, *The Myth of Liberal Individualism* (1999) 35 fn 21; B C Zipursky, 'Rawls in Tort Theory: Themes and Counter-themes' (2004) 72 *Fordham Law Review* 1923, 1928.

¹⁷⁷⁰ J Rawls, *Political Liberalism* (1993) 48-54. See also M Laughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 183, 188-9 for further details.

¹⁷⁷¹ Ibid, at p 52.

¹⁷⁷² A Ripstein, *Equality, Responsibility, and the Law* (1999) 7.

¹⁷⁷³ Human rights instruments such as ECHR and those of countries like Germany and Israel or Canada may differ in drafting but all employ an proportionality test in order to delimit human rights - see A Barak, 'Proportional Effect: The Israeli Experience' (2007) 57 *University of Toronto Law Journal* 369, 370. The same holds true for the Constitution of South Africa, where a similar suggestion had been made - see E Grant, 'Dignity and Equality' (2007) 7 *Human Rights Law Review* 299, 313.

¹⁷⁷⁴ BVerfGE 7, 15-6 ('Investment Aid') (1954).

the community in such a way as to emphasize the communitarian ties and obligations of the person without intruding on the latter's intrinsic and autonomous worth.¹⁷⁷⁵

This concept starts from 'the independence and individuality' of every human being 'as a basic constitutional value;' these values are, as we know, a reason for guaranteeing human rights.¹⁷⁷⁶ However, the individual has 'communitarian ties and obligations' and by recognising this element, the truism had been emphasised that rights absolutism is impossible with regard to the sociability of human beings.¹⁷⁷⁷ Particularly the proportionality test denotes the reconciliation of individual rights (for example, keeping private information secret from the world) and societal duty (allowing the public to learn about certain facts of overriding public interest).¹⁷⁷⁸ This may in turn illustrate the 'shades of grey' system of limiting conflicting rights no more than necessary or reasonable.¹⁷⁷⁹

The German system, for instance, treasures the worth of the individual. Like Tipping J, the Courts approach the protection of privacy by emphasising dignity and personal autonomy.¹⁷⁸⁰ This approach, however, does not allow the superego to flourish. In this model, there is room for both private seclusion and societal interaction. As we know, it is very difficult to draw a bright line between private and public facts.¹⁷⁸¹

¹⁷⁷⁵ See also R Wacks in R Wacks (ed), *Privacy Volume I* (International Library of Essays in Law & Legal Theory) (1993), xi – Introduction; *McKennitt* [2006] EMLR 178 (QB) para 50 per Eady J; *von Hannover v Germany* (2005) 40 ECHR 1 para 50.

¹⁷⁷⁶ W Brugger, 'The Image of the Person in the Human Rights Concept' *Human Rights Quarterly* 18.3 (1996) 594, 599; E J Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' [1997] *Utah Law Review* 963, 971.

¹⁷⁷⁷ Ibid; see also E J Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' [1997] *Utah Law Review* 963, 975; C E Wells, 'Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence' (1997) 32 *Harvard Civil Rights-Civil Liberties Law Review* 159, 161 (Wells argues that the Kantian autonomy concept 'attempts to reconcile, rather than divorce, individuality and community').

¹⁷⁷⁸ See also C Bird *The Myth of Liberal Individualism* (1999) 31; A Reath, *Agency & Autonomy in Kant's Moral Theory* (2006) 106.

¹⁷⁷⁹ See also W Brugger, 'The Image of the Person in the Human Rights Concept' (1996) 18 (3) *Human Rights Quarterly* 594, 608; E J Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' [1997] *Utah Law Review* 963, 989. See also M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574, 591; A Barak, 'Proportional Effect: The Israeli Experience' (2007) 57 *University of Toronto Law Journal* 369, 382.

¹⁷⁸⁰ P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 13.16.13.

¹⁷⁸¹ See *ABC v Lenah Game Meats Pty* (2001) 185 ALR 1 paras 40, 41; *McKennitt* [2006] EMLR 178 (QB) para 57 per Eady J; *Andrews v TVNZ* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 29.

In Europe as in Tipping J's version of the tort, the line is drawn with a value judgement as embodied in the 'reasonable expectation of privacy' test and even more so through the application of an *ad hoc* proportionality balancing test. This requires, however, a certain readiness to decide the merits of a privacy claim on the facts of the case.

In short, modern human rights instruments grounded in human dignity presuppose a self-confident human being, who is aware of and sensitive to the rights of others.¹⁷⁸² Rawls has formulated a similar idea by mentioning that agents are reasonable insofar as 'they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so.'¹⁷⁸³ Herein manifests the responsibility element as a flipside of granting individual rights.

The insistence on the objective standard in the law of provocation has its roots in legal history leading back to the 19th century.¹⁷⁸⁴ The privacy tort, by contrast, had no such legal history in this country. Its acknowledgement here could therefore involve challenging the legitimacy of the US test. This is what Tipping J did by replacing the test with the reasonableness element exerted by the domestic human rights instrument. It is in my view also of little assistance that the domestic BSA has applied the same test for some time. As we know, even the BSA intends to rephrase the test.¹⁷⁸⁵ Hold on, one might say, we still do not deal with criminal law here. A valid point, but his Honour apparently felt that one could not sufficiently control the *mental state* of humiliation by using a reasonable person in the common law tort of privacy. Instead, the subjective level of offence is controlled through the reasonable expectation and the reasonable limit on freedom of speech. Thus, his Honour's approach can be interpreted as saying

¹⁷⁸² E J Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' [1997] *Utah Law Review* 963, 972 who points out that the concept of dignity has a communitarian dimension in itself (in the context of German law); C E Wells, 'Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence' (1997) 32 *Harvard Civil Rights-Civil Liberties Law Review* 159, 161 (Wells observes that autonomy in this sense is not about *atomistic individuals* but about *social creatures* entitled to respect for their dignity' - emphasis added).

¹⁷⁸³ J Rawls, *Political Liberalism* (1993) 49. See also G C Keating, 'Reasonableness and Rationality in Negligence Theory' (1996) 48 *Stanford Law Review* 311, 318; B C Zipursky, 'Rawls in Tort Theory: Themes and Counter-themes' (2004) 72 *Fordham Law Review* 1923, 1928.

¹⁷⁸⁴ See, eg, *Green v Re* (1996-97) 191 CLR 334, 400 per Kirby J.

¹⁷⁸⁵ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 262.

that it ‘implicates the deeper connection between a system of private law and the overarching norms of the constitutional order – including [...] equality norms.’¹⁷⁸⁶ Simultaneously, it is a compelling way of reconciling two very important values in modern societies because it is in accordance with this country’s human rights instrument.

2.2.4 Conclusion

Tipping J’s approach, it seems reasonable to suggest, is fundamentally different from the joint judgment’s proposal. The differences are stark and there is thus more than one approach in New Zealand. From my point of view, Tipping J’s approach is preferable. The Judge advocates a modern, streamlined, consistent but nonetheless complex system, capable of producing rewarding results. Moreover, it is the only version of the tort consistent with the NZBoRA.

The joint judgment’s acknowledgement of the privacy tort should be very positively stressed. Compared to the tort as outlined by Tipping J, however, their Honours’ proposal is not characterised by a profound amount of ambition. Particularly with regard to mental states, it is conspicuous for its robust insistence on tests of predominantly historical significance. This, however, might again look differently from a domestic perspective. Given that the harm protected by the tort is ‘humiliation’ as opposed to an infringement of an individual right, a reasonable person test of some kind might be unavoidable.

Tipping J’s version of the tort is perhaps difficult to communicate in this country.¹⁷⁸⁷ The presupposition would be that the ‘unwanted child’ might guide the legal fate of New Zealand’s privacy tort to a considerable degree. The silence of the judgments following *Hosking* explains a lot in this respect. Hence, his Honour’s tort could be labelled as the ‘Sir Geoffrey Palmer tort’ because it is the fulfilment of ‘radical politics’ of the Fourth Labour Government.¹⁷⁸⁸ Similarly, it would require a peaceful ‘pere-

¹⁷⁸⁶ M Moran, *Rethinking the Reasonable Person* (2003) 283.

¹⁷⁸⁷ See also M Richardson, ‘Privacy and Precedent: The Court of Appeal’s Decision in *Hosking v Runtz*’ (2005) 11 *New Zealand Business Law Quarterly* 82.

¹⁷⁸⁸ T Arseneau, ‘A Bill of Rights’ in M Holland and J Boston (eds) *The Fourth Labour Government: Politics and Policy in New Zealand* (2nd ed, 1990) 22.

stroika',¹⁷⁸⁹ in parts of the common law through the application of a human rights instrument. Either this version of the tort was therefore 14 years too late or its time is still to come. In any case, it is an interesting approach because it shows what New Zealand law might look like.

The approach of the joint judgment is also symptomatic for the present state of the NZBoRA. The only proof of consistency is their Honours' allegation that the tort is consistent with the Act – that is the already familiar 'lip service' argument. This distinct version of the tort seems nonetheless preferable because it is communicable law. However, both approaches cannot be consistent with the Act.¹⁷⁹⁰ In a Westminster system with a subordinate human rights instrument (which includes an additional horizontal dimension), the supreme Parliament has to enact a law inconsistent with the NZBoRA.¹⁷⁹¹ The notion of a supreme law, at its heart, simply means elevating a certain set of principles or values above the rule of the democratic majority.¹⁷⁹² In the broadest sense, the result could be described as a separation of the democracy principle on one the hand and the liberty principle on the other.¹⁷⁹³ Where this elevation has not taken place, authority over civilian liberties remains vested in the hands of the democratically elected parliament. Parliament, in other words, is left to be the 'fox guarding the henhouse'.¹⁷⁹⁴ To turn the argument on its head, the judge is no such fox however. Given that he or she may appear to be one, a separation of power issue occurs in the author's respectful view. Hence, the tort either should be shaped according to Tipping J's approach or needs parliamentary authorisation if it is to be moulded differently. This would nevertheless only legalise the problem rather than solving it.

¹⁷⁸⁹ The Government had been described as being responsible for a 'perestroika' with a particular New Zealand flavour – see *ibid*, at p 1.

¹⁷⁹⁰ The approach of the joint judgment, as I have argued before, cannot be consistent with the NZBoRA, because their Honours' approach largely emulates the US tort – see above, eg, Chapter Two, 3.

¹⁷⁹¹ T Arseneau, 'A Bill of Rights' in M Holland and J Boston (eds), *The Fourth Labour Government: Politics and Policy in New Zealand* (2nd ed, 1990) 22, 33; see also D Haywood, 'Bill of Rights unlikely to grow up' printed in the New Zealand Herald on 28 August 2006.

¹⁷⁹² See also *Brooker v Police* [2007] 3 NZLR 91 (SC) para 170 per Thomas J.

¹⁷⁹³ See generally M Laughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 183, 192.

¹⁷⁹⁴ T Arseneau, 'A Bill of Rights' in M Holland and J Boston (eds), *The Fourth Labour Government: Politics and Policy in New Zealand* (2nd ed, 1990) 22, 33.

2.3 *The initial test of the privacy tort*

The remaining prerequisite is concerned with the nature of the disseminated information. In a chronological order, this has to be tested before the optional ‘highly offensive’ test of course. However, we have seen that New Zealand's law features two quite distinct versions of the tort. This in turn very much complicates our final analysis. The question concerned with the appropriateness of the initial test cannot be examined in isolation. Appropriateness rather depends on multifarious factors such as whether the tort is to be developed incrementally or based on principles. It may also strongly depend on the harm protected by the cause of action, because its outlook could take quite different forms depending on whether the gist of the action is identified as humiliation or distress as opposed to the invasion of an individual right to privacy.

Tipping J's proposition, as we know, omits an additional ‘highly offensive’ test. Instead, his Honour propounded a ‘reasonable expectation of privacy’ test requiring a value judgment.¹⁷⁹⁵ In that case, it seems plain that the initial test must necessarily carry a greater burden, because one element of the so-called twin elements is missing. Generally, the present writer favours the solution that we have attributed to English law and to Tipping J's proposition.¹⁷⁹⁶ Because this is not necessarily a realistic solution for New Zealand's law, we may confine preliminary observations largely to the approach of the joint judgment. In this respect, it will be expounded as to whether their Honours' first test is concerned with ‘private facts’ or ‘facts in respect of which there is a reasonable expectation of privacy.’¹⁷⁹⁷ I will argue that an initial ‘private facts’ test suits an incremental development of the tort. The ‘reasonable expectation’ formula, in contrast, represents a more ambitious approach. Such a test, as will be suggested, should be subdivided. Adopting Wacks' approach, the initial test should be concerned with (1) personal information that has to give rise to (2) a reasonable expectation of privacy. This test would also be part of an ‘ideal’ privacy tort. Furthermore, we will explore whether a theoretical concept of privacy could be utilised. I seek to show that privacy interests (despite numerous efforts) arguably cannot be confined to a single overarching defini-

¹⁷⁹⁵ see *Hosking* [2005] 1 NZLR 1 (CA) paras 249, 256.

¹⁷⁹⁶ As outlined, eg, in *McKennitt* [2007] 3 WLR 194 (CA) para 11 per Buxton LJ.

¹⁷⁹⁷ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.03.

tion.¹⁷⁹⁸ Instead, I suggest the application of a concept dovetailed for the purposes of the newly adopted tort, viz, a suitable concept for the unwarranted dissemination of personal information based on ‘control.’

2.3.1 ‘Private facts’ or ‘reasonable expectation’?

In the wake of *Hosking*, the definition of the privacy interest remained an area of difficulties since it only seemed ‘clear that domestic matters such as behaviour or personal or family circumstances will be private.’¹⁷⁹⁹ According to the joint judgment’s official statement of the first test, the plaintiff has to show ‘the existence of facts in respect of which there is a reasonable expectation of privacy.’¹⁸⁰⁰ During the discussion of this element, their Honours referred instead to ‘private facts’ at various points.¹⁸⁰¹ The question arose as to whether both expressions convey the same meaning.¹⁸⁰² Particularly the ‘reasonable expectation’ formula may encompass a broader application of the tort.¹⁸⁰³ However, this would contradict their Honours’ intention to keep the tort in close confinement.¹⁸⁰⁴

It has already been argued that a privacy tort forming part of the common law in a particular jurisdiction does not reinvent tort law itself. The answer to this question should be viewed in the broader context into which a new common law rule must fit. As the late Lord Cooke once said: ‘in contract as in other fields, the reasonable expectations of persons in the shoes of the respective parties may be seen as a governing concept permeating the common law.’¹⁸⁰⁵ This statement can be interpreted as alluding to a

¹⁷⁹⁸ Compare N A Moreham, ‘Privacy and the Common Law’ (2005) 121 *Law Quarterly Review* 628 for a recent suggestion to the contrary.

¹⁷⁹⁹ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 252.

¹⁸⁰⁰ *Hosking* [2005] 1 NZLR 1 (CA) para 117. See also R Tobin, ‘Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand’ (2004) 12 *Tort Law Journal* 95, 102.

¹⁸⁰¹ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.03; see also his ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 392 fn 16.

¹⁸⁰² J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 392

¹⁸⁰³ *Ibid*, at p 394; see too M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 127.

¹⁸⁰⁴ See *ibid*, at p 391.

¹⁸⁰⁵ As cited in J A Farmer, ‘Lord Cooke and Judicial Decision-making: A perspective from the Commercial Bar’ in P Rishworth (ed), *The struggle for simplicity in the law* (1997) 53, 65 (emphasis provided); see also J Smillie, ‘Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand’ [1996] *New Zealand Law Review* 254, 261 (Smillie is opposed to this view but cites another reference to the same effect).

general structural form of common law rules.¹⁸⁰⁶ Given that this opinion would constitute the prevailing view among judges in New Zealand, there would be no further query as to whether the initial test would be concerned with ‘private facts’ or a ‘reasonable expectation of privacy.’ Acknowledging a privacy interest in the common law would simply lead to an extension of the general structural form to the specific situation – the test consequently would have to satisfy reasonable expectations of privacy observed from an internal point of view. The adoption of rules or tests examined from an ‘external point of view,’ in contrast, would be rejected because its structural form would not pass muster. Instead, they would be identified, for example, as ‘quite unreal.’¹⁸⁰⁷ However, Lord Cooke’s views are not widely shared for reasons we do not need to explore. The courts have interpreted the ‘facts in respect of which there is a reasonable expectation of privacy’ requisite in two ways, both of which are discussed next.

2.3.1.1 A single initial test

In *TVNZ Ltd v Rogers*, the Court of Appeal summarised the meaning of the first limb by asking the following: ‘[i]s it a fact in respect of which there is a reasonable expectation of privacy? If so, it is a private fact.’¹⁸⁰⁸ This view accords with the joint judgment’s official statement, because the second limb of the tort, insofar as is relevant, reads: ‘publicity given to *those private facts*.’¹⁸⁰⁹

Their Honours reasoning reveals that the identification of ‘private facts’ would often be analogous to the test of ‘information with the necessary quality of confidence’ as employed in traditional breach of confidence.¹⁸¹⁰ This test usually determines that ‘something which is public property and public knowledge’ cannot be protected.¹⁸¹¹ The test was later refined inasmuch as the confidential nature of information is not

¹⁸⁰⁶ See generally R S Summers, ‘How Law is Formal and Why it Matters’ (1997) 82 *Cornell Law Review* 1165, 1209.

¹⁸⁰⁷ See *Campbell* [2004] 2 All ER 995 (HL) para 99 per Lord Hope.

¹⁸⁰⁸ Ibid; see also *Andrews v TVNZ Ltd* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 27. It should be noted that expressions on the scope of the tort in *Rogers* may be of questionable nature - *Rogers v TVNZ Ltd* [2007] NZSC 91 para 25 per Elias CJ.

¹⁸⁰⁹ *Hosking* [2005] 1 NZLR 1 (CA) para 117; see also *Rogers v TVNZ Ltd* [2007] NZSC 91 para 98 per McGrath J.

¹⁸¹⁰ Ibid, para 119; *Andrews v TVNZ Ltd* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 28.

¹⁸¹¹ *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415, 419 per Megarry J (internal citation omitted).

automatically lost given that it had been disclosed to a limited part of the public as opposed to the world at large.¹⁸¹² This would be in line with their Honours' following contention that '[p]rivate facts are those that may be known to some people, but not to the world at large.'¹⁸¹³ Thus understood the application of the tort might be limited to photographs not taken in a public place.¹⁸¹⁴ According to the Court's unanimous opinion, 'the law in New Zealand did not recognise a tortious cause of action in privacy based upon the publication of photographs taken in a public place;' '[t]he law should not do so, for various broad policy reasons.'¹⁸¹⁵ Likewise, relevant decisions of the BSA indicate that incidents occurring in public places are generally not actionable.¹⁸¹⁶

The 'reasonable expectation' formula, in contrast, was used predominantly in order to restrain privacy expectations of public persons including their family and children.¹⁸¹⁷ However, it is rather questionable whether their Honours afforded any substantial meaning to the reasonableness standard. New Zealand judges rather seem to share the predilection of their colleagues in the USA to conflate the plaintiff's privacy interests with the public interest in learning about the disputed information.¹⁸¹⁸ A clear separation of the two countervailing interests is apparently not intended. As we recollect, one commentator has addressed this issue as flat legal thinking.¹⁸¹⁹ Particularly the line of argument to the effect that a public person has necessarily reduced expectations of privacy *because* the public has a legitimate interest in being informed is an illustrative example. To this writer, the status of a person is distinct from the question whether

¹⁸¹² Eg, *Stephens v Avery* [1988] ch 449, 455 per Sir Nicolas Browne-Wilkinson VC. See N A Moreham, 'Privacy in Public Places' (2006) 65(3) *Cambridge Law Review* 606, 610-3 for further details.

¹⁸¹³ *Hosking* [2005] 1 NZLR 1 (CA) para 119; see too *Rogers v TVNZ Ltd* [2007] NZSC 91 para 99 per McGrath J; *Andrews v TVNZ Ltd* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 28.

¹⁸¹⁴ See U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 251; see also *Andrews v TVNZ Ltd* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 20.

¹⁸¹⁵ *Hosking* [2005] 1 NZLR 1 (CA); see also J F Burrows, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389, 393.

¹⁸¹⁶ E Simpson-Paton, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' [2000] *Toronto Law Review* 305, 319.

¹⁸¹⁷ *Hosking* [2005] 1 NZLR 1 (CA) paras 120-123.

¹⁸¹⁸ Ibid, para 123. In the context of US law, this observation has been made by J B Mintz, 'The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain' (1996) 55 *Maryland Law Review* 425, 441.

¹⁸¹⁹ G P Fletcher, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949, 951-2.

there are ‘facts in respect of which there is a reasonable expectation of privacy.’¹⁸²⁰ Particularly a ‘culture of justification’ is unlikely to develop under these circumstances. This would require retaining an initial sense of ‘wrongness,’ it specifically requires that the dissemination of the same sort of information might be justified if it relates to a ‘public figure’ while it might not be justified given that personal information about a private person is at issue.¹⁸²¹ In brief, the status of the person is relevant to the question as to whether a ‘wrongful loss’ of privacy has occurred.

That their Honours gave no substantive meaning to the reasonableness element may also be inferred from their justification for a freestanding highly offensive to reasonable person test. Their Honours suggested, ‘[i]t would be absurd, for example, to consider actionable merely informing a neighbour that one's spouse has a cold.’ It does not seem unfair to observe that ‘one's spouse has a cold’ consequently constitutes a ‘fact in respect of which there is a *reasonable* expectation of privacy’ in their Honours’ reasoning. Liability should explicitly not be imposed in such a scenario, but the tool to achieve this goal is unambiguously the highly offensive to a reasonable person test.¹⁸²² The Judges explicitly stated that the latter test relates to publicity and is not part of whether the information is private.¹⁸²³ Actionable ‘private facts’ have been determined at that stage already.¹⁸²⁴ The joint judgment’s formulation closely resembles the requirements of the American cause of action, which features an initial private facts test. The reasonable expectation formula, in contrast, is invoked occasionally in order to distinguish between the protection in public and private places.¹⁸²⁵ As Tipping J correctly pointed out: ‘it is conventional in the American jurisprudence to measure expectations of privacy and whether any expectation of privacy is reasonable by the *level of offence*.’¹⁸²⁶ The level of offence is measured by means of the highly offensive to a rea-

¹⁸²⁰ U J Cheer, ‘The Future of Privacy – Recent Legal Developments in New Zealand’ (2007) 13 *Canterbury Law Review* 169, 184.

¹⁸²¹ See generally G J Postema, ‘Risks, Wrongs and Responsibility – Coleman’s Liberal Theory of Commutative Justice’ (1993) 103 *Yale Law Journal* 861, 876-8.

¹⁸²² U J Cheer, ‘Privacy, the Bill of Rights and the BSA’ [2005] *New Zealand Law Journal* 222, 223.

¹⁸²³ *Hosking* [2005] 1 NZLR 1 (CA) para 127; see also *Andrews v TVNZ* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 25; U J Cheer, ‘Privacy, the Bill of Rights and the BSA’ [2005] *New Zealand Law Journal* 222, 223.

¹⁸²⁴ *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 68 per Panckhurst and O’Regan JJ.

¹⁸²⁵ Eg, *Shulman v Group W Prod Inc*, 18 Cal 4th 200, 213 (1998)

¹⁸²⁶ *Hosking* [2005] 1 NZLR 1 (CA) para 255 (emphasis provided).

sonable person test however. To my eyes, their Honours rather caused an imbalance with the subsequent ‘highly offensive’ test by implementing an *additional* reasonableness element into the original ‘private facts’ element.¹⁸²⁷

It seems settled that their Honours intended a tight confinement of the tort. In order to achieve this goal, they have arguably chosen to develop the new cause of action by means of the more pedestrian incremental method.¹⁸²⁸ This legal method lends itself easily to the cautious approach of protecting privacy interests in New Zealand.¹⁸²⁹ Most conspicuously, I suggest, is the defiance of this method to systematisation. It enables the courts to hold, for instance, that privacy is in ‘exceptional cases’¹⁸³⁰ protected in public places or that the courts may take ‘culpability and the blameworthiness of the plaintiff’ into account ‘on occasion.’¹⁸³¹ In short, it is suggested that the joint judgment’s overall reasoning rather bespeaks a preference for a ‘private facts’ test.¹⁸³² The conclusion is based on what their Honours presumably intended to lay down as law and not the wording of their official statement.

Such an approach would also not necessarily exclude the Court of Appeal’s suggestion in *Rogers* that the tort’s ambit is not confined to inherently private matters.¹⁸³³ The incremental method allows a limited development of the law on a case-by-case basis. ‘Private facts’ could be used as a generic term, which seems broad enough to embrace ‘public places,’ ‘voluntary public figure’ and the like as subgroups in order to define whether a ‘private fact’ can be identified in particular cases.

¹⁸²⁷ For the practical consequences of this imbalance see *Andrews v TVNZ* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) paras 25, 50.

¹⁸²⁸ See particularly *Hosking* [2005] 1 NZLR 1 (CA) para 117.

¹⁸²⁹ See also M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 51.

¹⁸³⁰ *Hosking* [2005] 1 NZLR 1 (CA) para 164; *Andrews v TVNZ Ltd* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 31.

¹⁸³¹ *Andrews v TVNZ* High Court Auckland CIV 2004-404-3536 (unreported, 15 December 2006, Allan J) para 42.

¹⁸³² But see J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 392, 394, 408.

¹⁸³³ *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 59 per Panckhurst and O’Regan JJ.

2.3.1.2 A subdivided first limb of the tort

Having suggested the preferable test for the tort in its present state, a more ambitious approach will be attempted. Such a test would involve reasonable expectations of privacy, but the term ‘reasonable’ should have a meaningful purpose in such a scenario. Information regarded as belonging to the privacy paradigm is within anyone’s conception of what is private.¹⁸³⁴ The privacy paradigm circumscribes the settled core of personal information that is ‘generally considered private.’¹⁸³⁵ However, because information about one’s health, family matters or sexuality is paradigmatic, its protection is in many situations already covered by non-legal regulation.¹⁸³⁶ A more ambitious approach would indeed extend the net to information that ought to be protected from dissemination. Such an extension might in turn require a more systematic approach since almost every fact whose publication seems unfair could be covered if it were otherwise.¹⁸³⁷ A major candidate for a more systematic approach is a first element subdivided into, for instance, a ‘private facts’ element which would have to give rise to a ‘reasonable expectation of privacy.’¹⁸³⁸ The High Court echoed this interpretation in *Rogers v TVNZ Ltd*.¹⁸³⁹ The Court asked ‘whether there are private facts and, if so, whether they are of a character to give rise to a reasonable expectation of privacy.’¹⁸⁴⁰

The Court of Appeal found this division to be unnecessary,¹⁸⁴¹ but the test is nevertheless not as tautological as it may seem at first sight. The dissemination of ‘one’s spouse has a cold’ information, by way of illustration, could be interpreted as being a ‘private fact.’ The example is quaint, but a cold is primarily a medical condition and, thus, forming part of the privacy paradigm. However, its dissemination would not give rise to a ‘reasonable expectation of privacy;’ the formula suggests that not all

¹⁸³⁴ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 392. For a similar suggestion see T I Emerson, ‘The Right to Privacy and Freedom of the Press’ (1979) 14 *Harvard Civil Rights – Civil Liberties Law Review* 329, 343.

¹⁸³⁵ J Lenow, ‘First Amendment Protection for the Publication of Private Information’ (2007) 60 *Vanderbilt Law Review* 235, 248.

¹⁸³⁶ See R Wacks (ed), *Privacy Volume I* (International Library of Essays in Law & Legal Theory) (1993), xii – Introduction.

¹⁸³⁷ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 393

¹⁸³⁸ U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 251.

¹⁸³⁹ (2005) 22 CRNZ 668 (HC) paras 40-53 per Venning and Winkelmann JJ.

¹⁸⁴⁰ As summarised in *TVNZ Ltd v Rogers* [2007] 1 NZLR 156 (CA) para 41 per Panckhurst and O’Regan JJ.

¹⁸⁴¹ *Ibid*.

medical conditions are *prima facie* actionable.¹⁸⁴² Furthermore, tribute has to be paid to the fact that the same information may in some contexts be regarded as private while it is not private at all in others.¹⁸⁴³ This writer, nevertheless, shares Wack's preference for the term 'personal information' in order to determine relevant information about an individual.¹⁸⁴⁴ Wacks counsels, sensibly, that the initial prerequisite should satisfy two requirements: (1) the quality of the information has to be identified as personal; and (2) there have to be 'reasonable expectations of the individual concerning its use.'¹⁸⁴⁵ These requirements consequently lead to the proposed structure of the privacy tort's first limb: it should be composed out of (1) a 'personal information' test and (2) a 'reasonable expectation of privacy' test.¹⁸⁴⁶ This structure of the tort's first limb leads us to the remaining question concerned with the implementation of a particular concept of privacy.

2.3.2. Contemporary concepts of privacy

Conceptualising privacy is difficult and can be confusing. In the aftermath of *Hosking*, it remained undetermined 'exactly what kinds of harm are relevant in a privacy action; or alternatively, what kinds of interests the new tort protects.'¹⁸⁴⁷ Privacy is notoriously hard to define, but the subscription to generalised values is nothing new for the common law. According to Wacks, similar criticisms could be put forth against the notions of 'freedom,' 'security' and 'liberty.'¹⁸⁴⁸ A counsel for the defendant in the *Douglas v Hello! Ltd*-litigation, for instance, confronted actor Michael Douglas on cross-examination with his suspicion that the 'celebrity' couple's privacy was not their

¹⁸⁴² See N A Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628, 642.

¹⁸⁴³ Ibid; see too R Wacks in R Wacks (ed), *Privacy Volume I* (International Library of Essays in Law & Legal Theory) (1993), xvi – Introduction; R C Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 *California Law Review* 957, 980.

¹⁸⁴⁴ R Wacks in R Wacks (ed), *Privacy Volume I* (International Library of Essays in Law & Legal Theory) (1993), xiv – Introduction; see too his 'Why there will never be an English common law privacy tort' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 154, 179-80.

¹⁸⁴⁵ Ibid, xvi – Introduction; see also *Douglas v Hello (No 3)* [2006] QB 125 para 83 per Lord Phillips MR; *Associated Newspapers Ltd v His Royal Highness the Prince of Wales* [2007] 3 WLR 222 (CA) para 33 per Blackburne J.

¹⁸⁴⁶ This is also the direction, in which the English law might develop - *McKennitt* [2007] 3 WLR 194 (CA) para 11 (CA) per Buxton LJ.

¹⁸⁴⁷ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.5.04 at p 760.

¹⁸⁴⁸ R Wacks in R Wacks (ed), *Privacy Volume I* (International Library of Essays in Law & Legal Theory) (1993), xiv – Introduction

primary concern. Instead, counsel identified the plaintiffs' supposed interest in maintaining control over the information and doing business. Douglas replied, '[c]ontrol is what gives you privacy'¹⁸⁴⁹ and counsel's original remark seemed to have backfired on his client.

We have already noted that the protected interest in New Zealand is most likely humiliation,¹⁸⁵⁰ which has been regarded as an interest grounded in human dignity.¹⁸⁵¹ We may also recollect that Prosser took a 'reductionist' approach to privacy and regarded the gist of the public disclosure tort as that of reputation with overtones of mental distress.¹⁸⁵² Taking up this stance was criticised, particularly because the scholar distilled the four branches of the privacy tort from a number of unrelated cases without an external or neutral conception of privacy.¹⁸⁵³

In their numerous critical responses, scholars tended to the other extreme - they have developed numerous external theories usually by resorting to fictional examples rather than practical cases. United probably only in their dissatisfaction with Prosser's conclusion, the results are often very evocative and useful when examined in isolation. Their discussion nevertheless tends to enter into vicious circles when considered in the light of competing concepts of privacy. One scholar illustrated this observation by noting, '[t]he method de rigueur in legal scholarship has been for the author to examine the previously-favo[u]red definition of privacy, tear it down to its bones, expose its fallacies, and establish a new contender for the crown.'¹⁸⁵⁴ An actual coronation never took place however. It seems as if it is always possible to identify a particular concept of privacy as either too narrow or too broad.¹⁸⁵⁵ Owing to the lack of space, the following discussion features only a fragmented overview of the plethora of possible privacy con-

¹⁸⁴⁹ J Rozenberg, *Privacy and the Press* (2004) 70.

¹⁸⁵⁰ *Hosking* [2005] 1 NZLR 1 (CA) para 128 per Gault P and Blanchard J.

¹⁸⁵¹ Eg, *ibid*, para 239 per Tipping J.

¹⁸⁵² W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 398. This view, however, does not seem to be shared in New Zealand – see *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, 732 per McGechan J ('The gist of the action, unlike defamation, is not injury to character and reputation, but to one's feelings and peace of mind'). See also *Hosking* [2003] 3 NZLR 385 (HC) para 167 per Rander-son J. But compare *TVNZ Ltd v Rogers* [2007] 1 NZLR 1 (CA) para 52 per Panckhurst and O'Regan JJ ('[...] the gist of this tort is an interference with privacy brought about by publicity').

¹⁸⁵³ R Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Review* 421, 460.

¹⁸⁵⁴ B Gormley, 'A Hundred Years of Privacy' [1992] *Wisconsin Law Review* 1335, 1338.

¹⁸⁵⁵ D J Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1094.

cepts. There are, however, broad classes of definitions, the most prominent of which will be briefly sketched next.

Bloustein was probably Prosser's first critic and rejected both the reputational and emotional distress arguments. He pointed out that considerable confusion remained about the nature of the interest which the 'right' to privacy is designed to protect.¹⁸⁵⁶ Confusion about it 'offends the primary canon of all science that a single general principle of explanation is to be preferred over a congeries of discrete rules.'¹⁸⁵⁷ He responded to Prosser that the tort protects 'our dignity as individuals' with the right to privacy representing a 'social vindication of the human spirit.'¹⁸⁵⁸ Bloustein's impetus to refer to privacy as an aspect of human dignity was to unite all four branches of the tort under one heading.

Gavison's influential concept defines privacy from a neutral point of view focussing on 'accessibility' of the individual.¹⁸⁵⁹ Similar to Bloustein, her aim was to include within her definition of privacy all branches of the law and under any label.¹⁸⁶⁰ Gavison's concept includes three independent elements (secrecy, anonymity and solitude), all of which are elements of accessibility.¹⁸⁶¹ A loss of privacy could occur through a change in any of these characteristics.

Westin has proposed another popular concept. In his opinion, 'privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.'¹⁸⁶² In a similar but distinct manner Gross defines privacy as having 'control over acquaintance with one's

¹⁸⁵⁶ E J Bloustein, 'Privacy as an Aspect of Human Dignity: An answer to Dean Prosser' (1964) 39 *New York University Law Review* 962.

¹⁸⁵⁷ *Ibid*, at p 963.

¹⁸⁵⁸ *Ibid*, at p 1003 (emphasis added).

¹⁸⁵⁹ Supporters of this concept include, eg, K Evans, 'Was Privacy the Winner of the Day?' [2004] *New Zealand Law Journal* 181, 182; E Simpson-Paton, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 308; M Waterfield, 'Now you see it, now you don't: the Case for an Infringement of Privacy in New Zealand' (2004) 10 *Canterbury Law Review* 182, 207; N A Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628, 636.

¹⁸⁶⁰ R Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421, 462.

¹⁸⁶¹ *Ibid*, at p 433. This approach has been adopted in U J Cheer and J F Burrows, *Media Law in New Zealand* (5th ed, 2005) 234.

¹⁸⁶² A F Westin, *Privacy and Freedom* (1970) 7.

personal affairs.’¹⁸⁶³ This definition also captures the interrelationship of privacy notions concerned with ‘accessibility’ on one hand and ‘control’ on the other;¹⁸⁶⁴ this insight will later prove illuminating. According to these concepts, privacy is, thus, about having ‘control’ over personal information.¹⁸⁶⁵

This is, of course, a crude overview,¹⁸⁶⁶ but it seems as if it is not even necessary to outline all possible concepts of privacy. Recently, Solove’s influential account¹⁸⁶⁷ posited that privacy has too many facets to be captured by a single concept.¹⁸⁶⁸ It is just a personal observation, but it is nevertheless intriguing to remark that women are apparently most worried about ‘accessibility’ whereas men usually favour the ‘control’ rationale. However, the flexibility needed to address a wide variety of situations where privacy interests are important is impeded by the application of a single overarching concept of privacy.¹⁸⁶⁹ Solove suggests, sensibly, that there might not be one but a multiplicity of answers depending on a variety of factors. He summarises this notion by mentioning, ‘[t]he moral is: Look to the circumstances!’¹⁸⁷⁰ Hence, to regard privacy as a multi-faceted interest seems preferable.

Solove made an important and rightfully acclaimed contribution to the legal discourse and this writer agrees with his initial proposition that privacy is not susceptible

¹⁸⁶³ H Gross, *Privacy and Autonomy* as cited by R Gavison, ‘Privacy and the Limits of Law’ (1980) 89 *Yale Law Journal* 421, 426.

¹⁸⁶⁴ See, eg, M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 4.5; D J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1092.

¹⁸⁶⁵ Other proponents of privacy as ‘control’ include, eg, J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 391; M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 4.5.; T Garety, ‘Redefining Privacy’ (1977) 12 *Harvard Civil Rights-Civil Law Review* 233, 236; R P Bezanson, ‘The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990’ (1992) 80 *California Law Review* 1133, 1150; C Fried, ‘Privacy’ (1968) 77 *Yale Law Journal* 475, 482-3.

¹⁸⁶⁶ See D J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1099-1124 for a more thorough discussion.

¹⁸⁶⁷ M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 paras 2.1, 39.

¹⁸⁶⁸ D J Solove, ‘A Taxonomy of Privacy’ (2006) 154 *University of Pennsylvania Law Review* 477, 485; see also M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 paras 37-9 for further references.

¹⁸⁶⁹ Ibid, at pp 1146-7; see also J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 409.

¹⁸⁷⁰ D J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1098-9 (internal citation omitted); see too his ‘The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure’ (2003) 53 *Duke Law Journal* 967, 1037 and ‘A Taxonomy of Privacy’ (2006) 154 *University of Pennsylvania Law Review* 477, 485. See also R C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 980.

to a single definition. It is essential to note, however, that the consequences inferred from this insight are not necessarily stringent. Solove utilises Wittgenstein's notion of 'family resemblances' as a device to reject a universal, all-embracing concept of privacy.¹⁸⁷¹ From this initial proposition, he embarks on an attempt to develop a *pragmatic* account. To the best my knowledge, the implications of this seemingly innocuous term have not been fully appreciated so far. The New Zealand Law Commission, for instance, has categorised pragmatism as a theory of privacy.¹⁸⁷² This view is not shared here. To my eyes, invoking Wittgenstein only serves as a peg on which to hang a pragmatist theory of law on. We have already noted that, according to Summers, 'pragmatic instrumentalism'¹⁸⁷³ is the only indigenous theory of law ever developed in the USA.¹⁸⁷⁴ Like his predecessors, Solove draws decisive inspiration from the ideas of John Dewey and William James.¹⁸⁷⁵ At this point, a cautionary word might be due though. These two philosophers already signed for the legal pragmatism of, for example, Oliver Wendell Holmes (and therefore at least indirectly Prosser).¹⁸⁷⁶ This influence was responsible for the rejection of fundamentals such as 'right' and 'duty' (regarded as unduly formalistic).¹⁸⁷⁷ Solove invokes, for instance, Dewey by contending that 'individual rights need not be justified as the immutable possessions of *individuals*;

¹⁸⁷¹ Ibid, at p 1126.

¹⁸⁷² Privacy: concepts and issues: review of the Law of Privacy part 1 (New Zealand Law Commission Study Paper; 19), para 2.32 (p 40).

¹⁸⁷³ There is no actual definition of these terms. 'Pragmatic instrumentalism' is Robert Summers' label for a number of ideas about law 'to which an influential group of early twentieth century American legal theorists subscribed' – M S Moore, 'In Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism' (1984) 69 *Cornell Law Review* 988, 988-9. Unifying rationales of this line of thought include, for example, the 'command theory' and the observation of legal rules from an 'external point of view.' We have discussed those ideas during the examination of the American tort. For further details refer to Chapter Two, 2.3.1; 2.3.2.2; 2.3.2.3.

¹⁸⁷⁴ R S Summers, 'Pragmatic Instrumentalism in Twentieth Century Legal Thought – A Synthesis and Critique of our Dominant Legal Theory about the Law and its Use' (1980-81) 66 *Cornell Law Review* 861, 862.

¹⁸⁷⁵ D J Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1127-8.

¹⁸⁷⁶ D Lyons, 'Legal Formalism and Instrumentalism – A Pathological Study' (1980-81) 66 *Cornell Law Review* 949, 949. Lyons explains the similarities between instrumentalism and positivism - at p 960. See also R S Summers, 'Pragmatic Instrumentalism in Twentieth Century Legal Thought – A Synthesis and Critique of our Dominant Legal Theory about the Law and its Use' (1980-81) 66 *Cornell Law Review* 861, 869 and his 'On Identifying and Reconstructing a General Legal Theory – Some Thoughts Prompted by Professor Moore's Critique' (1984) 69 *Cornell Law Review* 1014, 1018-9. This is not to say that Holmes fully subscribed to the work of Dewey and James - see generally C S Dailey, 'Holmes and the Romantic Mind' (1998) 48 *Duke Law Journal* 429 for further details.

¹⁸⁷⁷ Ibid; R S Summers, 'Pragmatic Instrumentalism in Twentieth Century Legal Thought – A Synthesis and Critique of our Dominant Legal Theory about the Law and its Use' (1980-81) 66 *Cornell Law Review* 861, 866.

instead, they are *instrumental* in light of “the contribution they make to the *welfare of the community*”.¹⁸⁷⁸ Suffice to reiterate that this philosophical framework led to a tort regime, which entirely focuses on the conduct of the defendant.¹⁸⁷⁹ Its most widely accepted tenet was the ‘prediction theory’ of law based on externally observable behaviour.¹⁸⁸⁰ Another unifying rationale of this line of thought is viewing law as a matter of exerting coercion or force on those who are subject to it.¹⁸⁸¹ We have discussed this point as ‘law as commands’ in the context of the current US tort.¹⁸⁸²

Solove falls prey to the same fallacies with his eyes open, because he subscribes to a recent ‘renaissance of pragmatism’ in American legal thought.¹⁸⁸³ The learned scholar regards a single overarching concept or grand theory of privacy as overly formalistic and even his perceived remedy sounds strangely familiar. Privacy protection, Solove counsels, means guarding ‘against disruptions to certain practices.’¹⁸⁸⁴ The resulting basic tenet of his taxonomy thus attempts ‘to *shift focus away* from the vague term “*privacy*” and toward the *specific activities* that pose privacy problems.’¹⁸⁸⁵

This approach, as Mark Hickford has very succinctly put it, is ‘rather odd’ because it presupposes privacy as something already existing.¹⁸⁸⁶ Solove’s approach actually begs the question wherein the substantial difference to Prosser’s approach lies. The point at issue is whether Solove indeed advances a new approach as he would us have believe. Although his contributions deserve the utmost respect, I should like to venture

¹⁸⁷⁸ D J Solove, ‘A Taxonomy of Privacy’ (2006) 154 *University of Pennsylvania Law Review* 477, 489 (emphasis supplied); see generally N M Richards, ‘The Information Privacy Law Project’ (2006) 94 *Georgetown Law Journal* 1087, 1092.

¹⁸⁷⁹ See above Chapter Two, 2.3.2.2.

¹⁸⁸⁰ R S Summers, ‘Pragmatic Instrumentalism in Twentieth Century Legal Thought – A Synthesis and Critique of our Dominant Legal Theory about the Law and its Use’ (1980-81) 66 *Cornell Law Review* 861, 872.

¹⁸⁸¹ R S Summers, ‘On Identifying and Reconstructing a General Legal Theory – Some Thoughts Prompted by Professor Moore’s Critique’ (1984) 69 *Cornell Law Review* 1014, 1019.

¹⁸⁸² See above Chapter Two, 2.3.2.3.

¹⁸⁸³ Solove lists several other proponents - D J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1091 fn 19, 1092 fn 20.

¹⁸⁸⁴ *Ibid*, at p 1129.

¹⁸⁸⁵ D J Solove, ‘A Taxonomy of Privacy’ (2006) 154 *University of Pennsylvania Law Review* 477, 482 (emphasis supplied); see also at p 485.

¹⁸⁸⁶ M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 paras 57, 60. See also A Bartow, ‘A Feeling of Unease about Privacy Law’ (2007) 155 *University of Pennsylvania Law Review* 52, 52 – Bartow, sensibly, questioned ‘the ultimate usefulness of the privacy framework that Solove has developed.’

that his claim does not hold water. To be fair to Solove, he alludes to Prosser's contribution right at the beginning of his taxonomy; he criticises Prosser's work, however, solely on the ground that it is exclusively concerned with tort law and therefore too narrow in focus whereas US privacy law is considerably vaster in scope.¹⁸⁸⁷ Moreover, Solove reproduces the popular assumption that Prosser's 'contribution was to synthesi[s]e the cases' that emerged from Warren and Brandeis' law review article.¹⁸⁸⁸ It has been argued here that this would vastly underestimate Prosser's influence.¹⁸⁸⁹ For our narrow purposes, it is important to observe that Solove utilises the same methods that we have already associated with Prosser's public disclosure tort. In the typical manner of the pragmatist, Solove merely identifies gaps in existing law,¹⁸⁹⁰ but he naturally does not question the pragmatist's legal methods. Regrettably, the scholar does not provide any hint as to why this 'renaissance of pragmatism' should provide more satisfactory results than the original legal pragmatism as embodied in Holmes' work and Prosser's tort.¹⁸⁹¹ Without further elaboration on this point, one may doubt whether expanding the methods of a dysfunctional privacy tort regime to other areas of the law serves a useful purpose. As we recollect, this tort is largely instrumental in ensuring an almost uninhibited liberty of the defendant, which protects freedom of speech and therefore the defendant's interest. How, one may wonder, can an account focussing on the very same conduct of the defendant simultaneously ensure a meaningful protection of the plaintiff's privacy interests? Moreover, it remains once more opaque how these countervailing external goals can be reconciled in practice.¹⁸⁹² Solove treats privacy at best as an additional 'external goal',¹⁸⁹³ unrelated to, for instance, tort law itself. In his view, privacy prob-

¹⁸⁸⁷ D J Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 482-83. For a similar critique see also A Bartow, 'A Feeling of Unease about Privacy Law' (2007) 155 *University of Pennsylvania Law Review* 52, 52.

¹⁸⁸⁸ Ibid, at p 483.

¹⁸⁸⁹ I understand that Solove has acknowledged Prosser's influence recently - N M Richards and D J Solove, 'Privacy's other Path: Recovering the law of Confidentiality' (2007) 96 *Georgetown Law Journal* 123, 148-51.

¹⁸⁹⁰ See generally D Lyons, 'Legal Formalism and Instrumentalism - A Pathological Study' (1980-81) 66 *Cornell Law Review* 949, 949.

¹⁸⁹¹ Oddly enough, Solove describes Prosser's contribution as 'far too out-of-date' - 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 562.

¹⁸⁹² See also the discussion concerned with the problem of coming to grips with 'the nature of law's goals and goal structures' in R S Summers, 'Pragmatic Instrumentalism in Twentieth Century Legal Thought - A Synthesis and Critique of our Dominant Legal Theory about the Law and its Use' (1980-81) 66 *Cornell Law Review* 861, 883-5.

¹⁸⁹³ See generally R S Summers, 'On Identifying and Reconstructing a General Legal Theory - Some Thoughts Prompted by Professor Moore's Critique' (1984) 69 *Cornell Law Review* 1014, 1017.

lems are ultimately a matter of ‘social *design*’ rather than a problem of individualised injuries.¹⁸⁹⁴ Prosser, as we recollect, thought that tort law was predominantly a matter of ‘social *engineering*’ rather than a problem of individualised injuries.¹⁸⁹⁵ Thus, it is doubtful whether a substantial difference to Prosser’s views exists. The difference between both approaches, it seems reasonable to suggest, is semantic. As a result, the present writer doubts that this is indeed a ‘harm-orientated’ approach.¹⁸⁹⁶ Moreover, I also do not share Hickford’s impression that Solove’s methodology lends itself to the inductive common law method.¹⁸⁹⁷ Quite the reverse, the fixation of the US courts on the defendant’s conduct led in the relevant context to uncompromising deductive syllogisms. We have conveniently described this adjudication technique as formalistic.¹⁸⁹⁸

While I am by no means unsympathetic to Solove’s work, it should be noted, in conclusion, that his account ultimately amounts to the picaresque attempt to proffer old wine in new bottles. Most importantly, this approach leads us away from a law examined from an ‘internal point of view’ towards a command based solution.¹⁸⁹⁹ Therefore, I propose to reject Solove’s rejuvenated pragmatic instrumentalism. We will adamantly follow the ‘justice tradition’ instead.

For the purposes of this analysis, it is convenient for us to pause here and recapitulate that an overarching concept of privacy arguably does not exist; pragmatism as a legal theory, by contrast, should be rejected as a valid alternative. As we know, however, privacy interests had been recognised as a matter of respect for the human dignity and autonomy. As Tipping J pointed out: ‘[i]t is of the essence of the dignity and personal autonomy and wellbeing of all human beings that some aspects of their private

¹⁸⁹⁴ N M Richards, ‘The Information Privacy Law Project’ (2006) 94 *Georgetown Law Journal* 1087, 1096.

¹⁸⁹⁵ W L Prosser, *Handbook of the Law of Torts* (1941) 17 as cited by C P Goldberg, ‘The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs’ (2005) 115 *Yale Law Journal* 524, 582.

¹⁸⁹⁶ Compare M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 53.

¹⁸⁹⁷ Compare *ibid*, para 56.

¹⁸⁹⁸ See above Chapter Two, 2.3.1.

¹⁸⁹⁹ For a recent rejection of sanction-based legal theories see also S J Shapiro, ‘What is the Internal Point of View?’ (2006) 75 *Fordham Law Review* 1157, 1170.

lives should be able to remain private if they wish so.’¹⁹⁰⁰ Burrows has cautioned, sensibly, that dignity alone is too broad a concept to be the only rationale of granting a privacy remedy.¹⁹⁰¹ Likewise, one scholar has observed that the concept promotes a humane and civilized life; ‘[t]he protection of human dignity allows a broader scope of action against treating people in intrusive ways.’¹⁹⁰² As a result, it has been persuasively argued that certain violations of dignity and autonomy do not involve losses of privacy.¹⁹⁰³

However, these concepts merely illustrate the reason for protecting privacy. They also signify the basis of a broader concept of individual liberalism as embodied in the NZBoRA or HRA. Similarly, claims to retain privacy are sometimes regarded as general claims to liberty.¹⁹⁰⁴ We have modified Anderson J’s terminology and described human dignity as the last trench in the protection of individual liberty.¹⁹⁰⁵ As Lord Walker put it, it is ‘the high principle’¹⁹⁰⁶ or, as Jonathan Kahn suggests, the ‘normative end of the continuum’¹⁹⁰⁷ in this context. Its protection should nevertheless not be equated with a concept of privacy.¹⁹⁰⁸ According to Kahn: ‘[w]hereas dignity broadly implicates a consideration of the inherent value of human beings, privacy involves the more focused right to protect the conditions necessary to individuation.’¹⁹⁰⁹

¹⁹⁰⁰ *Hosking* [2005] 1 NZLR 1 (CA) para 239. See also *Campbell* [2004] 2 All ER 995 (HL) para 50 per Lord Hoffmann; *Associated Newspapers Ltd v HRH the Prince of Wales* [2007] 3 WLR 222 (CA) para 119 per Blackburne J. See also E Volokh, ‘Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You’ (2000) 52 *Stanford Law Review* 1049, 1112 who identifies human dignity as the strongest argument to regulate some forms of personal information.

¹⁹⁰¹ J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 390.

¹⁹⁰² L E Rothstein, ‘Privacy or Dignity? Electronic Monitoring in the Workplace’ (2000) 19 *New York Law School Journal of International and Comparative Law* 379, 383; see also E J Eberle, ‘Human Dignity, Privacy, and Personality in German and American Constitutional Law’ [1997] *Utah Law Review* 963, 1007.

¹⁹⁰³ R Gavison, ‘Privacy and the Limits of Law’ (1980) 89 *Yale Law Journal* 421, 438.

¹⁹⁰⁴ D Mead, ‘It’s a Funny Old Game - Privacy, Football and the Public Interest’ [2006] *European Human Rights Law Review* 541, 546; M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 171. See too *Campbell* [2004] 2 All ER 995 (HL) para 12 per Lord Nicholls.

¹⁹⁰⁵ See above Chapter Two, 1.2.2.

¹⁹⁰⁶ *Douglas v Hello! Ltd (No 3)* [2007] 2 WLR 920 (HL) para 275.

¹⁹⁰⁷ J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 381.

¹⁹⁰⁸ See, eg, D Feldman, ‘Human Dignity as a Legal Value: Part 1’ [1999] *Public Law* 682, 690.

¹⁹⁰⁹ J Kahn, ‘Privacy as a Legal Principle of Identity Maintenance’ (2003) 33 *Seton Hall Law Review* 371, 378.

Solove has very helpfully pointed out that human dignity and personal autonomy are not independent of other theories. As an underlying rationale, these concepts can therefore be used in conjunction with more specific concepts of privacy.¹⁹¹⁰ Hence, to argue that privacy is ‘not a tidy concept’¹⁹¹¹ seems too negative. Instead, it could be argued that different concepts work best in different contexts.¹⁹¹² In that case, however, it is suggested to regard these concepts not as external and therefore detached from the legal protection of privacy. Instead, they should have an impact on the law itself. The ‘formalistic’ basis of the privacy interest can nevertheless be maintained; it also clarifies that we deal with an individualised injury caused by a particular conduct of the defendant - not with privacy as an external goal pursued as a matter of social engineering or design. Consequently, I consider next which concept fits the needs for present purposes. Furthermore, it will be discussed whether ‘identification’ of the plaintiff is necessary for making out the action.¹⁹¹³ The reason why these two issues should be discussed together is that the problem concerned with ‘identification’ does not seem to have a legal profile. This issue is rather related either to a certain privacy concept or to the ‘publicity’ requirement.¹⁹¹⁴

2.3.3 *The appropriate concept of privacy*

Apart from a tort protecting against the dissemination of personal information, an intrusion tort is most likely to occur as a distinct common law rule. The remaining two branches of the US privacy tort, in contrast, are unrelated to privacy interests in a strict sense.¹⁹¹⁵ Thus, it should be noted at the outset that I do not comprehend what judges and scholars mean when they refer to a ‘general tort of privacy.’¹⁹¹⁶ Intrusion and dissemination represent two distinct ‘wrongs’ in my view. As causes of action, they

¹⁹¹⁰ D J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1116. See too Privacy: concepts and issues: review of the Law of Privacy part 1 (New Zealand Law Commission Study Paper; 19), para 2.23. (p 37).

¹⁹¹¹ This argument has been raised by J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 408.

¹⁹¹² D J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1147.

¹⁹¹³ This issue is still open to debate in New Zealand - J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005), para 18.07.05; see too his ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 410.

¹⁹¹⁴ Evans, for instance has noted that an initial ‘reasonable expectation’ test arguably does not solve the issue - ‘Was Privacy the Winner of the Day’ [2004] *New Zealand Law Journal* 181, 184.

¹⁹¹⁵ J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.4.01 at p 751

¹⁹¹⁶ Eg, *Wainwright v Home Office* [2003] 4 All ER 969 (HL) para 27 per Lord Hoffmann.

ideally may be traced to the infringement of a common law right to privacy. Both aforementioned actions also seem to accord with Hickford's categories of 'local privacy' and 'informational privacy.'¹⁹¹⁷ As we will see in due course, each 'wrong' also requires distinguishable forms of conduct by the defendant. New Zealand's private facts tort was acknowledged in *Hosking* - a case which may also be interpreted as an intrusion case because the disputed photographs were taken surreptitiously.¹⁹¹⁸ The query about the appropriate concept for present purposes may therefore be confined to the distinction between both torts. Subsequently, we follow Weinrib's notion of an inherent ordering of the tort, that is to say that a particular 'wrong' done to the plaintiff should be inseparably linked to a particular form of conduct.¹⁹¹⁹ The result constitutes a single whole rather than tort comprised of independent elements.

One scholar described the US intrusion tort as protecting an 'ideal sphere [which] lies around every human being;' this sphere 'cannot be penetrated, unless the personality value of the individual is thereby destroyed.'¹⁹²⁰ The disclosure tort, in contrast, regulates the communication of personal information to others rather than physical behaviour (such as eavesdropping etcetera); the requirement of communicating information to other people has no analogue in the US intrusion tort.¹⁹²¹ It is, however, the communicative element, which causes the conflict between freedom of speech and pri-

¹⁹¹⁷ M Hickford, 'A Conceptual Approach to Privacy' NZLC MP19 paras 165.2, 165.3.

¹⁹¹⁸ See P and A Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), para 13.16.13.

Counsel for the claimant in *Campbell*, for instance, conceded basing the claim not on the intrusive taking of the photographs at issue – *Campbell* [2003] 1 All ER 224 (CA) para 31. See also A Sims, "'A Shift in the Gravity Centre': The dangers of Protecting Privacy through Breach of Confidence" [2005] *Intellectual Property Quarterly* 27, 43-4.

¹⁹¹⁹ E J Weinrib, 'Understanding Tort Law' (1989) 23 *Valparaiso University Law Review* 485, 511; see also his 'Causation and Wrongdoing' (1987) 63 *Chicago Kent Law Review* 407, 410

¹⁹²⁰ R C Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 *California Law Review* 957, 971.

¹⁹²¹ *Shulman v Group W Prod Inc*, 18 Cal 4th 200, 231 (1998); *Taus v Loftus*, 40 Cal 4th 683, 725 (2007); R C Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 *California Law Review* 957, 978; R L Rabin, 'Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss' (2006) 55 *De Paul Law Review* 359, 367; J Siprut, 'Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places' (2006) 33 *Pepperdine Law Review* 311, 317; Note 'In the Face of Danger: Facial Recognition and the Limits of Privacy Law' (2007) 120 *Harvard Law Review* 1870, 1876.

vacy.¹⁹²² Although both actions are frequently related,¹⁹²³ they should be distinguished from the very beginning.¹⁹²⁴

The only New Zealand judgment determining ‘private facts’ (as the initial test was called at that time) by adopting a concept of privacy was *L v G*¹⁹²⁵. Coincidentally, this case is also formidably suited for the illustration of the aforementioned distinction. Despite the defendant’s submission that the genitals of a sex worker could not be a private fact per se, Abbott J found the test to be satisfied. His Honour opined that this was an untenable argument, because the sex worker did not display his or her genitals to everyone. Only clients had access to them in return for payment and they consequently remained private for the purposes of the tort.¹⁹²⁶ The Judge’s argument states as follows:

[...] privacy is seen by the community as a value which is *peculiarly personal*, in the sense that it reinforces a “psychological need to preserve an *intrusion-free zone* of personality and family”, with the consequence that “there is always anguish and stress when that *zone is violated*” [...].¹⁹²⁷

This is by no means an exotic way of thinking about privacy, particularly the notion of privacy as a ‘zone’ makes appearances in English and European cases.¹⁹²⁸ According to the concept adopted by Abbott J, special emphasis seems to lie on an ‘intrusion-free zone’ of every human being (and therefore every plaintiff), which is protected by a ‘personal shield of privacy.’ Its violation by the defendant is supposed to cause anguish and stress. In brief, the defendant’s conduct is the cause of a particular harm done to the plaintiff. We have already noted that the application of arguably any

¹⁹²² J Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ (2003) 62(2) *Cambridge Law Journal* 444, 445.

¹⁹²³ D M Worley, ‘Shulman v Group W Productions: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity’ (1999-2000) 27 *Western State University Law Review* 535, 566; D J Solove, ‘The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure’ (2003) 53 *Duke Law Journal* 967, 1017.

¹⁹²⁴ J Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ (2003) 62(2) *Cambridge Law Journal* 444, 445.

¹⁹²⁵ [2002] NZAR 495.

¹⁹²⁶ *Ibid*, at p 509.

¹⁹²⁷ *Ibid*, at p 507-8 (emphasis added; internal citation omitted).

¹⁹²⁸ Eg, *McKennitt* [2006] EMLR 178 (QB) para 50 per Eady J; *von Hannover v Germany* (2005) 40 ECHR 1 para 50; P Gewirtz, ‘Privacy and Speech’ [2001] *Supreme Court Review* 139, 154-5.

advanced concept of privacy requires recognising both aforementioned aspects – the relationship at least between both litigants has to be of momentous significance.¹⁹²⁹ Inherent in Abbott J’s proposition is also a causation element, which links doer and sufferer of harm. A tort regime focusing, by contrast, entirely on the defendant’s conduct omits these factors and is rather unlikely to lead very far. These aspects of his Honour’s judgement are, thus, to be welcomed.

We must nonetheless clarify whether the specific ‘wrong’ brought about by the particular form of conduct is appropriate for present purposes. It is plain from Abbott J’s suggestion that the actionable ‘wrong’ is already committed by violating the personal shield protecting an intrusion-free zone.¹⁹³⁰ Another act of the defendant (such as the dissemination of the acquired information) is therefore not the decisive factor for an interference with the plaintiff’s privacy interests. Instead, his Honour seems to paraphrase the penetration of the ideal sphere lying around every human being, which we have associated with the US intrusion tort. The chosen concept in turn explains perhaps the most puzzling aspect of his Honour’s judgment. According to the Judge’s suggestion, identification of the plaintiff was unnecessary.¹⁹³¹ This was because the interests protected by the tort did not relate

to issues of perception and identification by those members of the public whom the information is *disclosed* but to the *loss of the personal shield of privacy* of the person to whom the information relates. The “loss” seems to be after all *sufficient* for a successful claim; it is in any case unimportant if others learned which individual had to suffer this particular loss.¹⁹³²

The present writer shares Katrine Evans’ view that the answer to the identification issue depends on one’s perception of what privacy actually entails.¹⁹³³ In *L v G*, identification of the plaintiff did not contribute to the harm done by losing a shield of privacy. And, that said, if the communication of information is not a decisive factor,

¹⁹²⁹ See above Chapter Two, 2.3.2.3.

¹⁹³⁰ See also K Evans, ‘Of Privacy and Prostitutes’ (2002) 20 *New Zealand University Law Review* 71, 91-2. In *Campbell* [2004] 2 All ER 995 (HL) para 75, Lord Hoffmann seems to indicate that the intrusion into a private place constitutes a distinguishable actionable ‘wrong.’

¹⁹³¹ See also *Graham v Central Pacific Finance Ltd* [2001] DCR 531 paras 17, 18.

¹⁹³² [2002] NZAR 495, 508 (emphasis provided).

¹⁹³³ K Evans, ‘Of Privacy and Prostitutes’ (2002) 20 *New Zealand University Law Review* 71, 75.

this is consequent.¹⁹³⁴ As Evans pointed out, identification is ‘inherent in the idea of divulging private information.’¹⁹³⁵ However, given that a communicative act does not contribute to an actionable wrong, it is difficult to see why any form of dissemination is necessary for making out the cause of action.¹⁹³⁶ In the context of the ‘publicity’ element of the US public disclosure tort, I have agreed with Weinrib’s proposition that once the plaintiff’s suffering is inseparably linked to the conduct of the defendant, the cause of action is not divisible into independent components. The aspects of the remedy rather constitute a single whole.¹⁹³⁷ This is not the case here. Rather, the dissemination element (the defendant’s conduct) is unrelated to the wrong and, thus, a divisible independent component of the remedy. It is suggested that the appropriate concept for present purposes should recognise the communication element as contributing to the actionable wrong rather than emphasising the information gathering.¹⁹³⁸ In sum, Abbott J’s concept of privacy is most suitable for a distinct intrusion tort.

But what is the appropriate concept for a tort concerned with the dissemination of personal information?¹⁹³⁹ In this context, concepts chiefly devoted to the notions of either ‘access’ or ‘control’ dominate the discussion.¹⁹⁴⁰ Nicole Moreham, for example, favours the access-rationale and disagrees with the notion of privacy as a matter of ‘controlling’ private information.¹⁹⁴¹ According to her critique, a person can already lose control over personal information without it actually being accessed; theories based

¹⁹³⁴ See U J Cheer, ‘The Future of Privacy – Recent Legal Developments in New Zealand’ (2007) 13 *Canterbury Law Review* 169, 178.

¹⁹³⁵ K Evans, ‘Of Privacy and Prostitutes’ (2002) 20 *New Zealand University Law Review* 71, 73; see too U J Cheer, ‘The Future of Privacy – Recent Legal Developments in New Zealand’ (2007) 13 *Canterbury Law Review* 169, 178 and M Waterfield, ‘Now You See It, Now You Don’t: the Case for a Tort of Infringement of Privacy in New Zealand’ (2004) 10 *Canterbury Law Review* 182, 209.

¹⁹³⁶ See also D J Solove, ‘The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure’ (2003) 53 *Duke Law Journal* 967, 1016-7.

¹⁹³⁷ E J Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, 511; see also his ‘Causation and Wrongdoing’ (1987) 63 *Chicago Kent Law Review* 407, 410 and C R Sunstein, ‘On Analogical Reasoning’ (1993) 106 *Harvard Law Review* 741, 789.

¹⁹³⁸ See also J F Burrows in S Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) para 18.07.04 at p 770.

¹⁹³⁹ This particular aspect is usually addressed as ‘informational privacy.’ Anita Allen defines the term as ‘confidentiality, secrecy, data protection, and control over personal information’ - ‘Coercing Privacy’ (1999) 40 *William and Mary Law Review* 723.

¹⁹⁴⁰ Both concepts are also sometimes combined - M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 4.3.

¹⁹⁴¹ N A Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628, 638, 640.

on control are said to inadequately distinguish between the risk of being accessed and the interference itself.¹⁹⁴² It should be noted, however, that Moreham has developed a general *external* concept as opposed to a concept focusing on a particular tort-law wrong. With regard to a tort requiring dissemination of information, the defendant has already accessed information and either has or is about to communicate it to others. The problem of distinguishing between the risk of being accessed and the access itself is, then, academic. Furthermore, Moreham contends that a person cannot maintain control over information unless one refrains from disclosing it to anyone.¹⁹⁴³ The learned scholar nevertheless suggests, sensibly, that this problem is avoided ‘if control is seen as a means of bringing privacy about rather than as privacy itself.’¹⁹⁴⁴ I agree, but this is precisely the point of applying a specific concept of privacy as a means to determine tort liability as opposed to a general external concept.¹⁹⁴⁵ As I translate the terms into German, access and accessibility also lend themselves more easily to the *acquisition* of information rather than their dissemination. Similar to Abbott J’s suggestion in *L v G*, the focus on access seems more appropriate for a distinct intrusion tort.¹⁹⁴⁶

It crystallises out of the previous discussion that a concept focusing on ‘control’ is most appropriate for present purposes. Such an approach has already received attention by some English courts.¹⁹⁴⁷ To bring the control over personal information into focus also accords with Wacks’ subdivided initial limb of the tort, particularly with the second sub-test requiring the plaintiff to show a ‘reasonable expectation concerning its use.’ This appears to imply that an individual can (or ought to) exert control over the dissemination of such information under certain circumstances. In other words, the maintenance of control over private information (the plaintiff’s interest) is ‘wronged’

¹⁹⁴² Ibid, at p 638.

¹⁹⁴³ Ibid.

¹⁹⁴⁴ N A Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628, 639; see also M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 150.

¹⁹⁴⁵ See also M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 150.

¹⁹⁴⁶ Virtually all examples provided in her account are concerned with the acquisition of information – see eg, ibid at p 640 (although Moreham claims that informational access also encompasses storage and dissemination); see also her definition of ‘access’ in N A Moreham, ‘Privacy in Public Places’ (2006) 65(3) *Cambridge Law Journal* 606, 617.

¹⁹⁴⁷ *Campbell* [2004] 2 All ER 995 (HL) para 51 per Lord Hoffmann; *HRH Prince of Wales v Associated Newspapers Ltd* [2008] EMLR 66 (Ch) para 119 per Blackburne J; see particularly *Green Corns Ltd v Claverley Group Ltd* [2005] EMLR 31 (QB) para 53 per Tugendhat J.

by dissemination (the defendant's conduct). The result would be an inherently ordered tort, in which harm and conduct are inseparably linked. I suggest, in conclusion, adopting a *control*-based concept of privacy in the context of disseminating certain types of information whereas Moreham's rationale based on access might be a major candidate in the context of a possible intrusion tort. This means consequently that the notion of privacy as 'control over access' should be rejected for practical purposes.¹⁹⁴⁸

Wacks nevertheless maintains that both sub-tests are important in determining *prima facie* actionable 'personal information.'¹⁹⁴⁹ How, then, could the *quality* of the information (the initial part of the tort's subdivided initial test) be identified as personal? A precise definition will be difficult to ascertain,¹⁹⁵⁰ but it is common ground that analogy to statute may influence the development of the common law.¹⁹⁵¹ According to Keith J, the 'statutory context [can] help [to] resolve questions about whether liability in tort is to be recognised or imposed.'¹⁹⁵² For England and Wales, an analogy to the Data Protection Act 1998¹⁹⁵³ springs to mind. Section 6 of the Act defines 'sensitive information' as information relating to a person's physical or mental health or condition, sexual life, and the commission or alleged commission by him of any offence. We may infer from this definition that these types of information are roughly identical with 'clearly private' and 'obviously private' information; they are mostly also in line with the 'privacy paradigm.' Nevertheless, this definition would not help much since it has been argued that a definition must be broad enough to encompass information that is not 'inherently private.'

Article 2(a) of the Data Protection Directive of the European Union 1995¹⁹⁵⁴ provides a broader definition. It circumscribes personal data as 'any information relat-

¹⁹⁴⁸ For such a view see M Hickford, 'A Conceptual Approach to Privacy' NZLC MP19 para 122.

¹⁹⁴⁹ R Wacks 'Why there will never be an English common law privacy tort' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 154, 179-80.

¹⁹⁵⁰ M Hickford, 'A Conceptual Approach to Privacy' NZLC MP19 para 5.

¹⁹⁵¹ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*; *Mortensen v Liang* [1992] 2 NZLR 292, 298 (xiii) per Cooke P for further references; see also *Hosking* [2005] 1 NZLR 1 (CA) para 6 per Gault P and Blanchard J.

¹⁹⁵² *Hosking* [2005] 1 NZLR 1 (CA) para 177.

¹⁹⁵³ See particularly *Green Corns Ltd v Claverley Group Ltd* [2005] EMLR 31 (QB) para 62 per Tugendhat J.

¹⁹⁵⁴ Directive 95/46EC of the European Parliament and of the Council of 24 October 1995.

ing to an identified or identifiable natural person.’¹⁹⁵⁵ Likewise, s 2 of the Privacy Act 1993 (NZ) defines personal information as ‘information about an identifiable individual;’ the term ‘individual’ is in turn defined as ‘a natural person, other than a deceased natural person.’ Murphy has proposed a similar concept, which contends that an individual can *control* the dissemination of ‘any data about an individual that is identifiable to that individual.’¹⁹⁵⁶ It has to be stressed that the identifiable individual has to be the plaintiff herself. Lord Phillips MR has suggested that ‘private information [...] must include information that is personal to the person who possesses it and that he does not intend will be imparted to the general public.’¹⁹⁵⁷

Solove has criticised this definition as too broad because ‘there is a significant amount of information identifiable to us that we do not deem as private.’¹⁹⁵⁸ This, however, is unpersuasive. For the purposes of this analysis, we apply this definition to the law. One would assume that there simply would be no plaintiff for a privacy tort if someone does not deem information to be private. Furthermore, such a formula is necessarily followed by an additional ‘reasonable expectation of privacy’ test in order to determine (*prima facie*) actionable personal information. To my mind, a meaningful limitation of the plaintiff’s interest is thereby achieved.

2.3.4 Benefits of applying the concept

The benefits of applying such a definition are nevertheless quickly enumerated. The context sensibility of the law defies a more elaborated definition, which is also reflected in the well-known limited success of legislative efforts in this area. The reasonable expectation concerning the use of personal information is therefore of central importance. Two modest points can be made, however.

¹⁹⁵⁵ The British transposition into national law (s 1 Data Protection Act 1998) reads as follows: personal data means data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

¹⁹⁵⁶ R S Murphy, ‘Property Rights in Personal Information: An Economic Defense of Privacy’ (1996) 84 *Georgetown Law Journal* 2381, 2383-4.

¹⁹⁵⁷ *Douglas v Hello! (No 3)* [2006] QB 125 para 83.

¹⁹⁵⁸ D J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1111-2; M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 6. See also *Harder v Proceedings Commissioner* [2000] 3 NZLR 80 (CA) paras 23, 24 per Tipping J.

Firstly, personal information should be concerned with the individual plaintiff; a privacy claim should not be just the echo of someone else's music. Gavison refers to this problem as a part of the 'relationship between an individual and pieces of information.'¹⁹⁵⁹ She points out that plaintiffs occasionally allege breaches of privacy while the disputed information effectively relates to their wife, husband, parents or children.¹⁹⁶⁰ She explains that this so-called 'extension of self' phenomenon stems from the fact that these plaintiffs have chosen their spouses which makes the spouse 'part' of their private life.¹⁹⁶¹ The privacy interests of the plaintiff may not be affected, but the choice of the spouse reflects on him or her and may therefore provoke legal action. Where no such choice is involved, for example, where privacy interests of the plaintiff's child are at stake, Gavison argues that the 'extension of self' is 'based on a feeling of responsibility for or identification with the other person.'¹⁹⁶²

The plaintiff in *Bradley v Wingnut Films Ltd* might have felt responsibility or identification in the aforementioned sense. The facts which were about to be disclosed did not relate to Mr Bradley as an individual, but to deceased family members including his son.¹⁹⁶³ This would not be 'personal information' for the purposes of a privacy tort. Neazor J was therefore right to indicate that the information had to be about the plaintiff.¹⁹⁶⁴ Moreover, the plaintiff was neither identified nor identifiable in that case. In *Hosking*, on the other hand, the Court of Appeal implicitly solved the 'extension of self' problem differently. The plaintiffs claimed that their children's privacy was about to be invaded.¹⁹⁶⁵ The Hoskings seemed to have acted with a mixture of 'responsibility and identification,' because they alleged that their children could be kidnapped if the defen-

¹⁹⁵⁹ R Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Review* 421, 431.

¹⁹⁶⁰ Ibid, fn 31. B C Murchison points out that, for instance, the disputed information in *Cox Broadcasting Corp v Cohn* related to the plaintiff's deceased daughter - 'Revisiting the American action for public disclosure of private facts' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 32, 45.

¹⁹⁶¹ R Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Review* 421, 431 fn 32.

¹⁹⁶² Ibid.

¹⁹⁶³ *Bradley v Wingnut Films Ltd* 24 IPR 205, 211 per Neazor J.

¹⁹⁶⁴ Ibid, at pp 210-1.

¹⁹⁶⁵ *Hosking* [2005] 1 NZLR 1 para 13 (CA) per Gault P and Blanchard J.

dant was allowed to disclose certain information about them.¹⁹⁶⁶ That would also not be ‘personal information’ for the purposes of a privacy tort.¹⁹⁶⁷

Secondly, the reach of the tort is confined to natural persons; companies are therefore not protected even if financial information would be at issue.¹⁹⁶⁸ The same holds true for claims which are effectively brought on behalf of a deceased natural person. In this context, it seems not even necessary to draw an analogy to statute. In fact, one of the oldest English common law rules is *actio personalis moritur cum persona*. In the context of defamation law, this ‘rule was an instantiation of the more general common law maxim holding that the death of a tort victim barred any action for the tort.’¹⁹⁶⁹ With regard to the protection of the privacy interest, the decisive question would thus not be whether a deceased dead person is vested with a right of privacy. Instead, it would be more important to ask whether the corresponding cause of action has to be classified as ‘*actio personalis*.’ If so, it dies with the person and any action for the tort is barred.

¹⁹⁶⁶ Ibid, para 124.

¹⁹⁶⁷ For a preferable solution see *Murray* [2007] EMLR 583 (Ch) paras 1, 7 per Patten J.

¹⁹⁶⁸ This issue is also subject to debate in New Zealand – see J F Burrows, ‘Invasion of Privacy – Hosking and Beyond’ [2006] *New Zealand Law Review* 389, 409.

¹⁹⁶⁹ B C Zipursky, ‘Ten Half-Truths about Tort Law’ (2008) 42 *Valparaiso Law Review* 1221, 1230.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

This analysis has sought to portray the protection of personal information as an aspect of privacy in three legal systems. The relevant law of the UK and the USA is strikingly different. After extensive consideration, however, it is at least possible to identify basic sets of coordinates or a frame of reference in both jurisdictions according to which the law develops. The New Zealand law, in contrast, remained to some extent obscure to this writer. That, however, is perhaps partly due the fact that there is no indigenous concept identifiable. Instead, the law seems to be torn between the approaches taken in the UK and the USA.

Privacy is a notoriously broad concept and a meaningful protection almost necessarily requires a systematic approach. In this respect, two methods of systematisation seem conceivable: statute or a close connection of the common law tort to the NZBoRA. An orthodox development of the common law does not seem to be an option, however. To my mind, the chief problem of the common law in this area is the reluctance to endorse and protect two interests (such as reputation *and* freedom of speech or privacy *and* freedom of speech) at the same time. The law seems to aim at a harmonious cohabitation of these interests, that is to say that judges seem to avoid a direct conflict of countervailing interests if possible. Furthermore, the situation has become more intricate because the courts now consider English cases alongside US authorities. It might at least be doubtful whether these sources can be combined meaningfully in this particular context. Given that a combination would be possible, it seems as if the number of cases occurring in New Zealand does not suffice to ensure a consistent development of the tort. In sum, the courts should not be left alone with the development of the privacy tort.

At first sight, the constitutionalisation of the tort may also be crossed out as a viable way of developing the law or so it seems. The standing and appreciation of the Act within the legal system appears much too weak as to provide a meaningful frame-

work for the tort. This has, in my view, nothing to do with the fact that the Act has not been entrenched as supreme law. At least from the perspective of an outside observer, it might sometimes seem as if it is not even treated as having the rank of an Act of Parliament. Only references to s 14 are consistently repeated.

It would appear that legislative action is inevitable. The New Zealand Law Commission recently entered into a process of approaching privacy conceptually. Mark Hickford has managed to provide ‘a star to navigate by’¹⁹⁷⁰ and that is, I think, what is most needed. The legal recognition of privacy does raise questions concerned with the reconciliation of individual and societal interests. It also does invite discussions concerned with positive and negative liberty or the equality of freedom. These are largely matters of political and constitutional theory. The work of the Law Commission is, of course, not to be criticised; it has so far presented the most rigorous and penetrating account of all Law Commissions including recent suggestions from Hong Kong and Australia. However, given that only a tiny fraction of these thoughtful contributions would have been made in the context of the NZBoRA, a lot of ink could be spared in the context of approaching privacy.¹⁹⁷¹ English law is instructive in this respect. As I have sought to show, it is capable of dealing with most, if not all, problematic areas to which the Law Commission has rightfully drawn attention.

The number of unsuccessful attempts to provide a workable statutory basis for such a tort is often stressed. One of the most important reasons might be that privacy is an individual interest, which has to be reconciled with the rights of others and society as a whole. The conflict between privacy and freedom of speech will pose a moral dilemma in many cases, which means that distributive justice will be a key element in this area of the law. Given the moderate performance of the highly offensive to a reasonable person test, a strong case for the ‘constitutionalisation’ of the common law tort exists. In my view, the connection of the common law to an overarching framework representing the shared values of a society provides the most compelling answer to the problem.

¹⁹⁷⁰ M Hickford, ‘A Conceptual Approach to Privacy’ NZLC MP19 para 1.

¹⁹⁷¹ See also U J Cheer, ‘The Future of Privacy – Recent Legal Developments in New Zealand’ (2007) 13 *Canterbury Law Review* 169, 170.

Whether privacy is among those values in New Zealand cannot be answered. If so, the law should be prepared to protect it as a right. In my ideal solution, the only desirable legislative act would be an amendment of the NZBoRA to include a right to privacy. An ideal tort would be a constitutionalised common law tort of privacy, which would entail the steps set out in the following paragraphs.

Parliament should amend the NZBoRA to include a right to privacy (a quasi-constitutional right to privacy). As an autonomous source of law, a common law right to privacy should be recognised. The quasi-constitutional right of privacy should be acknowledged as providing the democratic underpinning for the common law right to privacy.

The infringement of the common law right of privacy should give rise to a cause of action. The reach of the cause of action should be limited to a specific ‘civil wrong,’ which was caused by a specific conduct of the defendant. In other words, this cause of action should cover just one aspect of privacy, that is, the dissemination of personal or private information. The appropriate concept of privacy should be based on control. By applying the elements of the cause of action, the court should determine whether the circumstances of the infringement are as such that the plaintiff should be left to a remedy. The plaintiff should have a right if and only to the extent that she could hold the defendant under an obligation not to disseminate the information identified as private.

The cause of action itself should be ‘constitutionalised’ due to the horizontal application of freedom of speech as affirmed in s 14 and the amended right of privacy. The horizontal effect should be indirect, that is to say that the rights contained in the NZBoRA do not directly bind private actors. Instead, they are turned against the court. These rights should operate in the horizontal sphere between two private individuals in essentially the same manner as they would operate in their vertical dimension between state and individual. Consequently, they should be conceptualised as principles conferring an ‘ideal ought.’ As optimisation requirements, they have to be realised to the greatest extent possible, which should be ensured by means of a proportionality balancing exercise. As for the adjudication technique, normative and inductive reasoning on a

principled basis would be required. The cause of action would be comprised of the following elements:

- personal information in respect of which there is reasonable expectation of privacy
- (optionally) the defendant must have known or ought to have known that the claimant had such a reasonable expectation;
- a proportionality balancing exercise.

In the perhaps more realistic event of creating a statutory tort, it is suggested to consult also tort specialists. The Law Commissions of other countries seem to regard the problems involved largely from the privacy side. Privacy may be a newly protected interest, but it is nevertheless a tort like any other. Whatever the outcome will be, the Law Commission has made impressive first steps towards a meaningful protection of privacy. At the end of the day, the protection of privacy and freedom of speech may not be as problematic as the initial dialogue between Winston and Sir Geoffrey may have suggested. It is not all about conflict; both interests are also frequently interrelated and depend on one another. On a closer second look, Winston Smith and Sir Geoffrey Winston Palmer may have more in common than they probably think.

TABLE OF REFERENCES

Table of Legislation

New Zealand

Crimes Act 1961.

Defamation Act 1992.

Interpretation Act 1999.

New Zealand Bill of Rights Act 1990.

Privacy Act 1993.

United Kingdom

Human Rights Act 1998.

Data Protection Act 1998.

United States of America

Constitution of California.

Florida Statute § 794 (1987).

United States Constitution

Supranational and other countries

Canadian Charter of Rights and Freedoms

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

Data Protection Directive of the European Union 1995 (Directive 95/46EC of the European Parliament and of the Council of 24 October 1995).

International Covenant on Civil and Political Rights 1966 (entry into force 23 March 1976).

Table of cases

Australia

Australian Broadcasting Corporation v Lenah Game Meats Pty (2001) 185 ALR 1 (HCA).

Green v Re (1996-97) 191 CLR 334 (HCA).

Masciantonio v Re (1995) 183 CLR 58 (HCA).

Stingel v Re (1990) 97 ALR 1 (HCA).

Canada

Hill v Church of Scientology Toronto [1995] 2 SCR 1130.

Dagenais v Canadian Broadcasting Corp (1994) 120 DLR (4th) 12.

Law v Canada [1999] 1 SCR 497.

Re v Hill [1986] 1 SCR 313.

RWDSU v Dolphin Delivery [1986] 2 SCR 573.

Somwar v McDonald's Restaurants of Canada Ltd 263 DLR (4th) 752.

Shred-Tech Corp v Viveen [2006] OJ No 4893.

Europe

Earl Spencer v United Kingdom (1998) 25 EHRR CD 105.

Halford v United Kingdom (1997) 24 EHRR 523.

Peck v United Kingdom (2003) 13 BHRC 669.

PG & JH v United Kingdom 2001-IX Eur Ct HR 546.

Sunday Times v United Kingdom (1979) 2 EHRR 245.

von Hannover v Germany (2005) 40 EHRR 1.

Germany

BVerfGE 7, 198 (1958) (“Lüth”).

BVerfGE 7, 15-6 (1954) (“Investment Aid”).

BVerfGE 93, 266, 296 (1995) (“Soldiers are Murderers II”).

New Zealand

Andrews v TVNZ Ltd High Court Auckland, CIV 2004 -404-3536 (unreported, 15 December 2006, Allan J).

Bradley v Wingnut Films Ltd [1993] 1 NZLR 415.

Brooker v Police [2007] 3 NZLR 91 (SC).

Brash v Jane and John Doe HC Wellington, CIV-2006-485-2605 (unreported, 16 November 2006 MacKenzie J).

Brown v Attorney-General [2006] DCR 630.

Duff v Comunicado [1996] 2 NZLR 89 (HC).

Graham v Central Pacific Finance Ltd [2001] DCR 513.

Hansen v R [2007] 3 NZLR 1 (SC).

Harder v Proceedings Commissioner [2000] 3 NZLR 80 (CA).

Hosking v Runting [2003] 3 NZLR 385 (HC).

Hosking v Runting [2005] 1 NZLR 1 (CA).

Lange v Atkinson [1997] 2 NZLR 22 (HC).

Lange v Atkinson [1998] 3 NZLR 424 (CA).

Lai v Chamberlains [2006] NZSC 70.

L v G [2002] NZAR 495 (DC).

Mafart v TVNZ Ltd [2006] 3 NZLR 534 (CA).

Ministry of Transport v Noort; Police v Curren [1992] 3 NZLR 260 (CA).

Moonen v Film & Literature Board of Reviews (No 1) [2000] 2 NZLR 9 (CA).

Moonen v Film & Literature Board of Reviews (No 2) [2002] 2 NZLR 754 (CA).

P v D [2000] 2 NZLR 591 (HC).

South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd; Mortensen v Liang [1992] 2 NZLR 292 (CA).

Quilter v Attorney-General [1998] 1 NZLR 523 (CA).

R v Jeffries [1994] 1 NZLR 290 (CA).

R v N (No 2) (1999) 5 HRNZ 72 (CA).

R v Rongonui [2000] 2 NZLR 385 (CA).

Rogers v TVNZ Ltd (2005) 22 CRNZ 668 (HC).

Rogers v TVNZ Ltd [2007] NZSC 91.

Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd [2005] 1 NZLR 324 (CA).

Solicitor General v Radio New Zealand [1994] 1 NZLR 48 (HC).

Tucker v News Media Ownership Ltd [1986] 2 NZLR 716.

TVNZ Ltd v Rogers [2007] 1 NZLR 1 (CA).

TVNZ Ltd v Quinn [1996] 3 NZLR 24 (CA).

United Kingdom

A v B plc [2002] 2 All ER 545 (CA).

Anns v Merton London Borough Council [1978] AC 728 (HL).

Associated Newspapers Ltd v His Royal Highness the Prince of Wales [2007] 3 WLR 222 (CA).

Associated Newspapers Ltd v His Royal Highness the Prince of Wales [2006] EWCA Civ 1776.

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2001] 3 WLR (CA).

Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109.

Attorney General for Jersey v Holley [2005] UKPC 23.

Campbell v MGN Ltd [2003] 1 All ER 224 (CA).

Campbell v MGM Ltd [2004] 2 All ER 995 (HL).

CC v AB [2007] EMLR 11 (QBD).

Coco v A N Clark (Engineers) Ltd [1968] FSR 415.

Dorset Yacht Co Ltd v Home Office [1970] 2 All ER 294 (CA)

Douglas v Hello! Ltd (No1) [2001] 2 All ER 289 (CA).

Douglas v Hello (No 3) [2006] QB 125.

Douglas v Hello! Ltd (No 3) [2007] 2 WLR 920 (HL).

Douglas v Hello! Ltd (No 5) [2003] 3 All ER 996 (Ch).

Green Corns Ltd v Claverley Group Ltd [2005] EMLR 31 (QB).

Hellewell v Chief Constable of Derbyshire [1995] 4 All ER 473.

His Royal Highness the Prince of Wales v Associated Newspapers Ltd [2008] EMLR 66 (Ch).

Initial Services Ltd v Putterill [1968] 1 QB 396.

International Transport Roth GmbH v Secretary of State for the Home Department [2003] QB 728.

John v Associated Newspapers Ltd [2006] EMLR 27 (QB).

Kaye v Robertson [1991] FSR 62 (CA).

Lion Laboratories Ltd v Evans [1985] 1 QB 526.

Lord Browne of Madingley v Associated Newspapers Ltd [2007] EMLR 19 (QB).

Lord Browne of Madingley v Associated Newspapers Ltd [2007] 3 WLR 289 (CA).

McKennitt v Ash [2006] EMLR 178 (QB).

McKennitt v Ash [2007] 3 WLR 194 (CA).

McLaughlin v O'Brian [1982] 1 AC 410 (HL).

Murray v Express Newspapers [2007] EMLR 583 (Ch).

Nettleship v Weston [1971] 2 QB 691.

R v Broadcasting Standards Commission, ex parte British Broadcasting Corporation [2001] QB 855.

R v Morhall [1996] AC 90 (HL).

R v Smith [2001] 1 AC 146 (HL).

Regina (Daly) v Secretary of State for the Home Department [2001] 2 WLR 1622 (HL).

Venables and another v News Group Newspapers and others [2001] 1 All ER 908 (Fam).

Wainwright v Home Office [2003] 4 All ER 969 (HL).

Wilkinson v Downton [1897] 2 QB 57.

X v Unknown Persons [2007] EMLR 10 (QBD).

United States of America

Abrams v United States 250 US 616 (1919).

Alvarado v KOB-TV LLC, (2007) Westlaw 2019752.

American Broadcasting Companies Inc v Gill, 6 SW 3d 19 (1999).

Anderson v Fisher Broadcasting Companies Inc, 712 P 2d 803 (1986).

Ashcroft v The Free Speech Coalition, 535 US 234, (2002).

Bartnicki v Vopper, 532 US 514 (2001).

Barnhart v Paisano Publications LLC, 457 F Supp 2d 590 (2006).

Batts v City of Baton Rouge, 501 So 2d 302 (1987).

Beaumont v Brown, 237 NW 2d 501 (1976).

Benally v Hundreds Arrow Press Inc, 614 F Supp 969 (1985).

Bodah v Lakeville Motor Express Inc, 663 NW 2d 550 (2003).

Bonome v Kaysen and Random House, (2004) Westlaw 1194731.

Borquez v Ozer, 923 P 2d 166 (Colo App 1995).

Bowers v Hardwick, 478 US 186 (1986).

Brents v Morgan, 299 SW 967 (1927).

Briscoe v Reader's Digest Association Inc, 93 Cal Rptr 866 (1971).

Campbell v Seabury Press, 614 F 2d 395 (1980).

Chaplinsky v New Hampshire, 315 US 568 (1942).

Cordts v Chicago Tribune Comp, 860 NE 2d 444 (2006).

Cox Broadcasting Corp v Cohn, 420 US 469 (1975).

Cumrine v Harte-Hanks Television, 37 SW 3d 124 (2001).

Daily Mail Pub Co v Smith, 443 US 97 (1979).

Daily Times Democrat v Graham, 162 So 2d 474 (1964).

Daly v Viacom Inc, 238 F Supp 2d 1118 (2002).

Diaz v Oakland Tribune Inc, 139 Cal App 3d 128, 130 (1983).

Dietz v Finley Fine Jewellery Corp, 754 NE 2d 958 (2001).

Doe v Methodist Hospital, 690 NE 2d 681 (1997).

Duncan v Peterson, 835 NE 2d 411 (2005).

New York v Ferber, 458 US 747 (1982).

Fernandez Wells v Beauvais, 983 P 2d 1006 (1999).

Florida Star v BGF, 491 US 524 (1989).

Forsher v Bugliosi, 163 Cal Rptr 628 (1980).

Four Navy Seals v Associated Press, 413 F Supp 2d 1136 (2005).

Furman v Sheppard, 744 A.2d 583 (2000).

Gates v Discovery Communication Inc, 131 Cal Rptr 2d 534 (2003).

Gilbert v Medical Economics Co, 665 F 2d 305 (1981).

Green v Chicago Tribune Comp, 675 NE 2d 249 (1996).

Griswold v Connecticut, 381 US 479 (1965).

Hall v Post, 372 SE 2d 711 (1988).

Haynes v Alfred A Knopf Inc, 8 F 3d 1222 (1993).

Hogan v Hearst Corp, 945 SW 2d 246 (1995).

Huskey v National Broadcasting Company Inc, 632 F Supp 1282 (1986).

Jaubert v Crowley Post-Signal Inc, 375 So 2d 1386, 1388 (1979).

Johnson v K Mart Corp, 723 NE 2d 1192, 1197 (2000).

Kaletha v Bortz Elevator Co Inc, 383 NE 2d 1071 (1978).

Katz v United States, 389 US 347 (1967).

Kitt v Capitol Concerts Inc, 742 A 2d 856 (1999).

Kuczaba v Pollock, 742 NE 2d 425, 435 (2000).

Lake v Wal-Mart Stores Inc, 582 NW 2d 231 (1998).

Lawrence v Texas, 539 US 558 (2003).

Mayall v Dennis Stuff Inc, (2002) Westlaw 32113761.

McNamara v Freedom Newspapers Inc, 802 SW 2d 901 (1991).

Mc Surely v McClellan, 753 F 2d 88 (1985).

Melvin v Reid, 112 Cal App 285 (1931).

M G v Time Inc, 107 Cal Rptr 2d 504 (2001).

Miller v California, 413 US 15 (1973).

Miller v Motorola Inc, 560 NE 2d 900 (1990).

Morgan by and through Chambon v Celender, 780 F Supp 307 (1992).

Munsell v Hambright, 776 NE 2d 1272 (2002).

New York Times v Sullivan, 376 US 254 (1964).

Olson v Red Cedar Clinic, 681 NW 2d 306 (2004).

Ozer v Borquez, 940 P 2d 371 (1997).

Pachowitz v LeDoux, 666 NW 2d 88 (2003).

Pavesich v New England Life Ins Co, 50 SE 68 (1905).

Perry Educators Association v Perry Local Educators' Association, 460 US 37 (1983).

Police Department of the City of Chicago v Mosley, 92 S Ct 2286 (1972).

RAV v City of St Paul, 505 US 377 (1992).

Reeves v Fox Television Network, 983 F Supp 703 (1997).

Reid v Pierce County, 961 P 2d 333 (1998).

Richard v Wal-Mart Stores Inc, (2007) Westlaw 1521467.

Roberson v Rochester Folding Box Co, 64 NE 442 (1902).

Roe v Heap, (2004) Westlaw 1109849.

Roe v Wade, 410 US 113 (1973).

Roehrborn v Lambert, 660 NE 2d 180 (1995).

Romaine v Kallinger, 537 A 2d 284 (1988).

Ross v Midwest Communications Inc, 870 F 2d 271 (1989).

Shattuck-Owen v Snowbird Corp, 16 P 3d 555 (2000).

Shulman v Group W Production Inc, 18 Cal 4th 200 (1998).

Skinner v Oklahoma, 316 US 535 (1942).

Solomon v National Inquirer Inc, (1996) Westlaw 635384.

Star-Telegram Inc v Doe, 915 SW 2d 471 (1995).

Stien v Marriot Ownership Resorts Inc, 944 P 2d 374 (1997).

Swinton Creek Nursery v Edisto Farm Credit ACA, 483 SE 2d 789 (1998).

Taus v Loftus, 40 Cal 4th 683 (2007).

Time Inc v Hill, 385 US 374 (1967)

Turnbull v American Broadcasting Companies Inc, (2004) 32 Media Law Reporter 2442.

Uranga v Federated Publications Inc, 67 P 3d 29, 35 (2003).

Urbaniak v Newton, 226 Cal App 3d 1128 (1991).

Vassiliades v Garfinckel's Brooks Bros, 492 A 2d 580 (1985).

Virgil v Time Inc, 527 F 2d 1122 (1975).

Virginia v Black, 538 US 343 (2003).

White v Township of Winthrop, 116 P 3d 1034 (2005).

Whitney v California, 274 US 357 (1927).

Wilson v Grant, 687 A 2d 1009 (1996).

Winstead v Sweeney, 517 NW 2d 874 (1994).

Wynne v Loyola University of Chicago, 741 NE 2d 669 (2000).

Young v American Mini Theatres Inc, 427 US 50 (1976).

Books

American Law Institute, Restatement of the Law (Second), Torts (1977).

Anderson, D A, 'The Failure of American Privacy Law' in Markesinis, B S (ed), *Protecting Privacy* (1999) 139.

Aristotle, Selections from Nicomachean Ethics and Politics (The Collector's Library of Essential Thinkers, 2004).

Arseneau, T, 'A Bill of Rights' in Holland, M and Boston J (eds), *The Fourth Labour Government: Politics and Policy in New Zealand* (2nd ed, 1990) 22.

Barendt, E, 'Privacy and freedom of speech' in Richardson, M and Kenyon A T (eds), *New Dimensions in Privacy Law* (2006) 11.

Bird, C, *The Myth of Liberal Individualism* (1999).

Blackstone, Sir W, *Commentaries on the Laws of England* (16th ed, 1825) Book I.

Burrows, J F in Todd, S (ed), *The Law of Torts in New Zealand* (4th ed, 2005).

Butler, P and A, *The New Zealand Bill of Rights Act: A Commentary* (2005).

Cheer, U J and Burrows J F, *Media Law in New Zealand* (5th ed, 2005).

Cooley, T, *The Elements of Torts* (1895).

Coppel, J, *The Human Rights Act 1998* (2000).

Duxbury, N, *Patterns of American Jurisprudence* (1995).

Dworkin, R M, *Law's Empire* (1986).

Dworkin, R M, *Taking Rights Seriously* (Duckworth, 1978).

Habermas, J, *Between Facts and Norms* (W Rehg trans, Cambridge, Massachusetts, 1996).

Hart, H L A, *The Concept of Law* (Clarendon 2nd ed, 1994).

Hegel, G W F, *Elements of the Philosophy of Right* (A W Wood ed; H B Nisbet trans, CUP 1991).

Hirschkop, K, 'Justice and Drama: on Bakhtin as a complement to Habermas' in Crossley, N and Roberts, M (eds), *After Habermas: New Perspectives on the public Sphere* (2004) 49.

Holmes, O W, Jr, *The Common Law* (Macmillan, London 1882).

Honoré, T, *Responsibility and Fault* (1999).

Joseph, P A, *Constitutional and Administrative law in New Zealand* (2nd ed, 2001).

Joseph, P A, *Constitutional and Administrative law in New Zealand* (3rd ed, 2007).

Keeton, W P (ed), *Prosser and Keeton on Torts* (5th ed, 1984).

Keith, K J, 'A Bill of Rights for New Zealand? Judicial Review Versus Democracy' in *A Bill Of Rights For New Zealand* (1985)

Kelsen, H, *Pure Theory of Law* (M Knight trans, University of California Press 1967).

Kenyon, A T and Richardson, M, 'New dimensions in privacy: Communications technologies, media practises in law' in Kenyon, A T and Richardson, M (eds), *New Dimensions in Privacy Law* (2006) 1

Lucy, W N R, *Philosophy of Private Law* (2007).

- Markesinis, B S and Enchelmaier, S, 'Human Rights under German Constitutional Law' in Markesinis, B S (ed), *Protecting Privacy* (1999) 191.
- McDowall, M and Webb, D, *The New Zealand legal system: Structure and Processes* (4th ed, 2006).
- Minister of Justice, A Bill of Rights for New Zealand - A White Paper (1985).
- Moran, M, *Rethinking the Reasonable Person - An Egalitarian Reconstruction of the Objective Standard* (2003).
- Murchison, B C, 'Revisiting the American action for public disclosure of private facts' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 32.
- Nowak, J E, *Constitutional Law* (5th ed, 1995).
- Orwell, G, *Nineteen Eighty-Four* (Everyman's Library 1992).
- Phillipson, G 'The right of privacy in England and Strasbourg compared' in Richardson, M and Kenyon, T A (eds), *New Dimensions in Privacy Law* (2006) 184.
- Prosser, W L, *Handbook of the Law of Torts* (4th ed, 1971).
- Rawls, J, *A Theory of Justice* (OUP, 1971).
- Rawls, J, *Political Liberalism* (1993).
- Raz, J, *The Morality of Freedom* (OUP, 1986).
- Reath, A, *Agency & Autonomy in Kant's Moral Theory* (2006).
- Richardson, M and Hitchens, L, 'Celebrity privacy and the benefits from simple history' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 250.
- Ripstein, A, *Equality, Responsibility, and the Law* (1999).
- Rishworth, P, 'Lord Cooke and the Bill of Rights' in Rishworth (ed), *The Struggle for simplicity in the law* (1997).
- Rishworth, P; Hushcroft, G; Optician, S and Mahoney, R, *The New Zealand Bill of Rights* (2003).
- Roberts, J M, 'John Stuart Mill, free speech and the public sphere: a Bakhtinian critique' in N Crossley and J M Roberts (eds), *After Habermas: New Perspectives on the Public Sphere* (2004) 67.
- Rozenberg, J, *Privacy and the Press* (2004).
- Schauer, F, 'Freedom of expression adjudication in Europe and the United States: a case study in comparative constitutional architecture' in G Nolte (ed), *European and US Constitutionalism* (CUP 2005) 49.
- Scragg, R, *New Zealand's Legal System* (2005).
- Singh, R, 'Privacy and the Media: The Impact of the Human Rights Bill' in Markesinis, B S (ed), *Protecting Privacy* (1999) 169.
- Stoll, H, 'General Right to Personality in German Law' in Markesinis, B S (ed), *Protecting Privacy* (1999) 29.
- Thomas, E W, *The Judicial Process* (2005).

Todd, S, 'Negligence and Policy' in Rishworth, P (ed), *The struggle for simplicity in the law* (1997)

Vetri, D, *Tort law and practice* (1998).

Wacks, R, *Privacy and Press Freedom* (1995).

Wacks, R (ed), *Privacy Volume I* (International Library of Essays in Law & Legal Theory) (1993).

Wacks, R, 'Why there will never be an English common law privacy tort' in M Richardson and A T Kenyon (eds), *New Dimensions in Privacy Law* (2006) 154.

Waldron, J, *Liberal Rights* (1993).

Westin, A F, *Privacy and Freedom* (1970).

White, G E, *Tort law in America: An Intellectual History* (expanded ed, 2003).

Wright, J, *Tort Law and Human Rights* (2001).

Zweigert, K and Kötz, H, *An Introduction to Comparative Law* (T Weir trans, 3rd ed, 1998).

Articles

Ackerman, B, 'Tort Law and Communitarism: Where Rights Meet Responsibilities' (1995) 30 Wake Forest Law Review 645.

Alder, J, 'The Sublime and the Beautiful: Incommensurability and Human Rights' [2006] *Public Law* 697.

Aleinikoff, T A, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943.

Alexy, R, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572.

Allen, A, 'Coercing Privacy' (1999) 40 *William and Mary Law Review* 723.

Aplin, T, 'The Development of the Action for Breach of Confidence in a Post-HRA Era' [2007] *Intellectual Property Quarterly* 19.

Atiyah, P S, 'The Legacy of Holmes through English Eyes' (1983) 63 *Boston Law Review* 341.

Bacon, K W, 'Florida Star v B J F: The Right of Privacy Collides with the First Amendment' (1990) 76 *Iowa Law Review* 139

Bagshaw, R, 'Unauthorised Wedding Photographs' (2005) 121 *Law Quarterly Review* 550

Bains, S, 'Personality Rights: Should the UK Grant Celebrities a Proprietary Right in Their Personality?' (2007) 18 *Entertainment Law Review* 165.

Barak, A, 'Proportional Effect: The Israeli Experience' (2007) 57 *University of Toronto Law Journal* 369.

Bartow, A, 'A Feeling of Unease about Privacy Law' (2007) 155 *University of Pennsylvania Law Review* 52.

- Beasley, K M, 'Up-Skirt and other Dirt: Why Cell Phone Cameras and other Technologies Require a New Approach to Protecting Personal Privacy in Public Places' (2006) 31 *Southern Illinois University Law Journal* 69.
- Bezanson, R P, 'The Developing Law of Editorial Judgment' (1999) 78 *Nebraska Law Review* 754.
- Bezanson, R P, 'The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990' (1992) 80 *California Law Review* 1133.
- Blasi, V, 'Holmes and the Marketplace of Ideas' [2004] *Supreme Court Review* 1.
- Bloustein, E J, 'Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?' (1968) 46 *Texas Law Review* 611.
- Bloustein, E J, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962.
- Bostwick, G L, 'The Newsworthiness Element: Shulman v Group W Prods., Inc. Muddies the Waters' (1999) 19 *Loyola of Los Angeles Entertainment Law Review* 225.
- Brown Scott, W, 'Oliver Wendell Holmes on Equality and Adarand' (2003) 47 *Howard Law Journal* 59.
- Brazell, L, 'Confidence, Privacy and Human Rights: English Law in the Twentieth Century' (2005) 27 *European Intellectual Property Review* 405.
- Brugger, W 'The Image of the Person in the Human Rights Concept' (1996) 18 (3) *Human Rights Quarterly* 594.
- Butler, D, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339.
- Burrows, J F, 'Invasion of Privacy – Hosking and Beyond' [2006] *New Zealand Law Review* 389.
- Burrows, J F, 'Review: Media Law' [2004] *New Zealand Law Review* 787.
- Burrows, J F 'Review: Media Law' [2006] *New Zealand Law Review* 769.
- Buxton, R, 'The Human Rights Act and Private Law' (2000) 116 *Law Quarterly Review* 48.
- Cane, P, 'Distributive Justice and Tort Law' [2001] *New Zealand Law Review* 401.
- Cane, P, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 203.
- Cheer, U J, 'Censorship and the Bill of Rights' [2000] *New Zealand Law Journal* 145.
- Cheer, U J, 'The Future of Privacy – Recent Legal Developments in New Zealand' (2007) 13 *Canterbury Law Review* 169.
- Cheer, U J, 'Privacy and the Public Interest' (2005) 1 *Privacy Law Bulletin* 145.
- Cheer, U J, 'Privacy, the Bill of Rights and the BSA' [2005] *New Zealand Law Journal* 222.
- Chriss, W J, 'Personhood and the Right to Privacy in Texas' (2007) 48 *South Texas Law Review* 575.
- Clark Kelso, J, 'False Light Privacy: A Requiem' (1992) 32 *Santa Clara Law Review* 783.

- Clarke, L, 'Remedial Responses to Breach of Confidence: The Question of Damages' (2005) *Civil Justice Quarterly* 316.
- Coleman, J L, 'The Mixed Conception of Corrective Justice' (1992) 77 *Iowa Law Review* 427.
- Coleman, J L, 'Tort Law and the Demands of Corrective Justice' (1992) 67 *Indiana Law Review* 349.
- Coleman, J L and Kraus, J, 'Rethinking the Theory of Legal Rights' (1986) 95 *Yale Law Journal* 1335.
- Collins, H 'Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization' < <http://www.lse.ac.uk/collections/law/wps/WPS06-2007Collins.pdf>> 13 March 2008.
- Coyle, S, 'Positivism, Idealism and the Rule of Law' (2006) 26 *Oxford Journal of Legal Studies* 257.
- Cribbs, Y, 'The Public Interest defence to the Action for Breach of Confidence and the Law Commission's Proposals on Disclosure in the Public Interest ' (1984) 4 *Oxford Journal of Legal Studies* 361.
- Dailey, C S, 'Holmes and the Romantic Mind' (1998) 48 *Duke Law Journal* 429.
- Dendy, G, 'The Newsworthiness Defense to the Public Disclosure Tort' (1997) 85 *Kentucky Law Journal* 147.
- Dickler, G, 'The Right of Privacy – A Proposed Redefinition' (1936) 70 *United States Law Review* 435.
- Dworkin, R M, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1.
- Easton, E B, 'Public Importance: Balancing Proprietary Interests and the Right to Know' (2003) 21 *Cardozo Arts and Entertainment Law Journal* 139.
- Eberle, E J, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' [1997] *Utah Law Review* 963.
- Eberle, E J, 'Public Discourse in Contemporary Germany' (1997) 47 *Case Western Reserve Law Review* 797.
- Edelman, P B, 'Free Press v Privacy: Haunted by the Ghost of Justice Black' (1990) 68 *Texas Law Review* 1195.
- Elder, D A, 'Rhode Island Privacy Law - An Overview and some Important Recent Developments' (1998) 31 *Suffolk University Law Review* 83.
- Elder, D A, 'Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwork's Attempts to Circumvent New York Times v Sullivan' (2007) 9 *Vanderbilt Journal of Entertainment and Technology Law* 551.
- Elford, J, 'Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort' (1995) 105 *Yale Law Journal* 727.
- Emerson, T I, 'The Right to Privacy and Freedom of the Press' (1979) 14 *Harvard Civil Rights – Civil Liberties Law Review* 329.
- Englard, I, 'Human Dignity: From Antiquity to Modern Israel's Constitutional Framework' (2000) 21 *Cardozo Law Review* 1903.
- Evans, K, 'Of Privacy and Prostitutes' (2002) 20 *New Zealand University Law Review* 71.

Evans, K, 'Reverse gear for NZ's privacy tort: the Hosking decision' *Privacy Law and Policy Reporter* available at <http://www.austlii.edu.au/journals/PLPR/2003/35.html>, at 29 May 2006.

Evans, K, 'Was Privacy the Winner of the Day' [2004] *New Zealand Law Journal* 181.

Feldman, D, 'Human Dignity as a Legal Value: Part 1' [1999] *Public Law* 682.

Fletcher, G P, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949.

Fletcher, G P, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 537.

Fried, C, 'Privacy' (1968) 77 *Yale Law Journal* 475.

Fuson, J H, 'Protecting the Press from Privacy' (1999) 148 *University of Pennsylvania Law Review* 629.

Gardbaum, S, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387.

Gardbaum, S, 'Where the (State) Action is' (2006) 4 *International Journal of Constitutional Law* 760.

Garety, T, 'Redefining Privacy' (1977) 12 *Harvard Civil Rights-Civil Law Review* 233

Gavison, R, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421.

Gavison, R, 'Too Early for a Requiem: Warren and Brandeis were Right on Privacy v Free Speech' (1992) 43 *South Carolina Law Review* 437.

Geddis, A, 'Hosking v Runtig: A privacy tort for New Zealand' (2005) 13 *Tort Law Review* 5.

Geddis, A, 'The Horizontal Effect of the New Zealand Bill of Rights Act, as Applied in Hosking v Runtig' [2004] *New Zealand Law Review* 681.

Gewirtz, P, 'Privacy and Speech' [2001] *Supreme Court Review* 139.

Gielniak, P, 'Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment' (1999) 39 *Santa Clara Law Review* 1217.

Goldberg, J C, and Zipursky, B C, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 *Fordham Law Review* 1563.

Goldberg J C and Zipursky, B C, 'The Moral of MacPherson' (1998) 146 *University of Pennsylvania Law Review* 1733.

Goldberg, C P, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 *Yale Law Journal* 524.

Gómez-Arostegui, H T, 'Defining Private Life Under The European Convention on Human Rights by Referring to Reasonable Expectations' (2005) 35 *California Western International Law Journal* 153.

Gonzalez, E W, "'Get That Camera Out of my Face!" An Examination of the Viability of Suing "Tabloid Television" for Invasion of Privacy' (1997) 51 *University of Miami Law Review* 935.

Gormley, B 'A Hundred Years of Privacy' [1992] *Wisconsin Law Review* 1335.

Grant, E, 'Dignity and Equality' (2007) 7 *Human Rights Law Review* 299.

Green, L, 'The Right of Privacy' (1932) 27 *Illinois Law Review* 237.

Grey, T C, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787.

Grimm, D, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383.

Halberstam, D, 'Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights' (2007) 5 *International Journal of Constitutional Law* 166.

Halpern, S W, 'Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations' (1991) 43 *Rutgers Law Review* 539.

Halpern, S W, 'The 'Inviolable Personality' Warren and Brandeis after One Hundred Years' (1990) *Northern Illinois University Law Review* 387.

Hart, C, 'Y.G. v Jewish Hospital of St. Louis: Breathing Life into the "Disclosure of Private Facts" Tort' (1991) 35 *Saint Louis University Law Journal* 931.

Hart, H L A, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

Heffernan, W C, 'Privacy Rights' (1995) 29 *Suffolk University Law Review* 737.

Herget, S E and Wallace, S, 'The German Free Law Movement as the Source of American Legal Realism' (1987) 73 *Virginia Law Review* 399.

Hertig Randall, M, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?' (2006) 6 *Human Rights Law Review* 53.

Heyman, S J, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression' (1998) 78 *Boston University Law Review* 1275.

Hickford, M, 'A Conceptual Approach to Privacy' New Zealand Law Commission M P19.

Hilmert, J M, 'The Supreme Court Takes on the First Amendment Privacy Conflict and Stumbles: Bartnicki v Vopper, the Wiretapping Act, and the Notion of Unlawfully Obtained Information' (2002) 77 *Indiana Law Journal* 639.

Hilzendeger, K, 'Unreasonable Publicity: How Well Does Tort Law Protect the Unwarranted Disclosure of a Person's HIV-Positive State?' (2003) 35 *Arizona State University Law Journal* 187.

Horder, J, 'Can the Law do without the Reasonable Person?' (2005) 55 *University of Toronto Law Journal* 253.

Hovenkamp, H, 'Knowledge about Welfare: Legal Realism and the Separation of Law and Economics' (2000) 84 *Minnesota Law Review* 805.

Hovenkamp, H, 'The Marginalist Revolution in Legal Thought' (1993) 46 *Vanderbilt Law Review* 305.

Hunt, J H, 'Bartnicki v Vopper: Another Media Victory or Ominous Warning of a Potential Change in Supreme Court First Amendment Jurisprudence?' (2003) 30 *Pepperdine Law Review* 367.

Hunt, M, 'The "Horizontal Effect" of the Human Rights Act' [1998] *Public Law* 423.

Ingber, S, 'Rethinking Intangible Injuries: A Focus on Remedy' (1985) 73 *California Law Review* 772.

Ingber, S, 'The Marketplace of Ideas: A Legitimizing Myth' [1984] *Duke Law Journal* 1.

Jansen, N, 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' (2004) 24 *Oxford Journal of Legal Studies* 443.

- Jennings, L M, 'Paying the Price for Privacy: Using the Private Facts Tort to Control Social Security Number Dissemination and the Risk of Identity Theft' (2004) 43 *Washburn Law Journal* 725.
- Joyce, G, 'Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy' (Book review) (1986) 39 *Vanderbilt Law Review* 851.
- Jurata, J A, 'The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts' (1999) 36 *San Diego Law Review* 489.
- Kagan, E, 'Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine' (1996) 63 *University of Chicago Law Review* 413.
- Kahn, J, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 *Seton Hall Law Review* 371.
- Kalven, H, Jr, 'Privacy in Tort Law-Were Warren and Brandeis Wrong?' (1966) 31 *Law and Contemporary Problems* 326.
- Kay, R S, 'The European Convention on Human Rights and the Control of Privacy Law' [2005] *European Human Rights Law Review* 466.
- Keating, G C, 'Reasonableness and Rationality in Negligence Theory' (1996) 48 *Stanford Law Review* 311.
- Kelley, P, 'Infancy, Insanity and Infirmary in the Law of Torts' (2003) 48 *American Journal of Jurisprudence* 179.
- Kennedy, D, 'Form and Substance in Private Law Adjudication' (1975) 89 *Harvard Law Review* 1685.
- Kersch, K, 'The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law' (2005) 4 *Washington University Global Studies Law Review* 345.
- Kilkenny, R, 'Invasion of Privacy for the Greater Good: Why Bartnicki v Vopper Deserves the Right of Privacy and the First Amendment' (2003) 64 *Ohio State Law Journal* 999.
- Klug, F, 'A Bill of Rights: Do we need one or do we already have one' [2007] *Public Law* 701.
- Knight, D R, "'I'm Not Gay - Not That There's Anything Wrong with That!": Are Unwanted Imputations of Gayness Defamatory?' (2006) 37 *Victoria University of Wellington Law Review* 249.
- Knudson, J, 'The Influence of the German Concepts of Volksgeist and Zeitgeist on the Thought and Jurisprudence of Oliver Wendell Holmes' (2002) 11 *Journal of Transnational Law and Policy* 407.
- Kreimer, D F, 'Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law' (1991) 140 *University of Pennsylvania Law Review* 1.
- Ku, A, 'Talk is Cheap, but a Picture is Worth a Thousand Words: Privacy Rights in the Era of Camera Phone Technology' (2005) 45 *Santa Clara Law Review* 679.
- Kumm, M, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574.
- Kumm, M, 'What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement' available at <http://www.lsr.nelco.org/nyu/plltwp/papers/46> at 08 February 2008.
- Lahav, P, 'Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech' (1988) 4 *Journal of Law and Politics* 451.

- Laughlin, M, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 183.
- LeBel, P A, 'The Right to Privacy One Hundred Years Later: Rights-Talk and Torts-Talk' (1991) 41 *Case Western Reserve Law Review* 811.
- Leebron, W, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769.
- Leigh, I, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) *International and Comparative Law Quarterly* 57.
- Lenow, J, 'First Amendment Protection for the Publication of Private Information' (2007) 60 *Vanderbilt Law Review* 235.
- Letsas, G, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705.
- Lewin, K M, 'The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany' (1968) 17(3) *International Comparative Law Quarterly* 571.
- Lewis, M; Hinton, C; Beverley-Smith, H and G Hussey, 'Review of the Law of Privacy' (2005) 16 (7) *Entertainment Law Review* 174
- Lewis, J, 'The European Ceiling on Human Rights' [2007] *Public Law* 720.
- L'Heureux-Dubé, C, 'Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective' (2003) 1 *International Journal of Constitutional Law* 35
- Lindquist, W A, 'Oliver Wendell Holmes and External Standards of Criminal and Tort Liability' (1979) 28 *Buffalo Law Review* 607.
- Lisle, R, 'The Right of Privacy (A Contra View)' (1930) 19 *Kentucky Law Journal* 137.
- Logan, D A, 'Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering' (1997) 83 *Iowa Law Review* 161.
- Logan, D A, 'Tort Law and the Central Meaning of the First Amendment' (1990) 51 *University of Pittsburgh Law Review* 493.
- Lum, A J, 'Don't Smile, Your Image Has Just Been Recorded On A Camera-Phone: The Need For Privacy In The Public Sphere' (2005) 27 *University of Hawaii Law Review* 377.
- Lyons, D, 'Legal Formalism and Instrumentalism – A Pathological Study' (1980-81) 66 *Cornell Law Review* 949.
- Markin, M 'An "Unholy Alliance": The Law of Media Ride-Alongs' (2004) 12 *CommLaw Conspectus* 33.
- Masterman, R, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act' (2005) 54 *International and Comparative Law Quarterly* 907.
- Mayer-Schonberger, V and Foster, T E, 'More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law' (1995) 18 *Boston College International and Comparative Law Review* 59.
- Merris, A, 'Can We Speak Freely Now? Freedom of Expression under the Human Rights Act' (2002) 6 *European Human Rights Law Review* 750.

- Meyer, L R, 'Unruly Rights' (2000) 22 *Cardozo Law Review* 1.
- McClurg, A J, 'Bringing Privacy out of the Closet: A Tort Theory for Intrusions in Public Places' (1995) 73 *North Carolina Law Review* 989.
- McClurg, A J, 'Kiss and Tell: Protecting Intimate Relationship Privacy through Implied Contracts of Confidentiality' (2006) 74 *University of Cincinnati Law Review* 887.
- McNulty, P J, 'The Public Disclosure of Private Facts: There is Life after Florida Star' (2001) 50 *Drake Law Review* 93.
- Michelman, F I, 'The Bill of Rights, the Common Law, and the Freedom-Friendly State' (2003) 58 *University of Miami Law Review* 401.
- Mintz, J B, 'The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain' (1996) 55 *Maryland Law Review* 425.
- Mize, S, 'Resolving Cases of Conflicting Rights under the New Zealand Bill of Rights Act' (2006) 22 *New Zealand Universities Law Review* 50.
- Moon, G and Allen, A, 'Dignity Discourse in Discrimination Law: A Better Route to Equality' (2006) 6 *European Human Rights Law Review* 610.
- Moore, M S, 'In Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism' (1984) 69 *Cornell Law Review* 988.
- Moreham, N A, 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 *Law Quarterly Review* 373.
- Moreham, N A, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628.
- Moreham, N A, 'Privacy in Public Places' (2006) 65(3) *Cambridge Law Review* 606.
- Moreham, N A, 'Recognising Privacy in England and New Zealand' (2004) 63(3) *Cambridge Law Journal* 555.
- Moretti, B, 'Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation' (1993) 11 *Cardozo Arts and Entertainment Law Journal* 857.
- Morgan, J, 'Hello! Again: Privacy and Breach of Confidence' (2005) *Cambridge Law Journal* 549.
- Morgan, J, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62(2) *Cambridge Law Journal* 444.
- Mulheron, R, 'A Potential Framework for Privacy? A Reply to Hello!' (2006) 69(5) *Modern Law Review* 679.
- Mullender, R, 'The Reasonable Person, The Pursuit of Justice, and Negligence Law' (2005) 68(4) *Modern Law Review* 681.
- Mullender, R, 'Tort, Human Rights, and Common Law Culture' (2003) 23 *Oxford Journal of Legal Studies* 301.
- Murphy, R S, 'Property Rights in Personal Information: An Economic Defense of Privacy' (1996) 84 *Georgetown Law Journal* 2381.

- Norton, J, 'Hosking v Runtig and the Role of Freedom of Expression' [2004] *Auckland University Law Review* 245.
- Note 'Holmes: A Legend in Search of Demystification' (1990) 103 *Harvard Law Review* 800.
- Note 'In the Face of Danger: Facial Recognition and the Limits of Privacy Law' (2007) 120 *Harvard Law Review* 1870.
- Note 'The Right of Privacy' (1906-07) 12 *Virginia Law Register* 91.
- Ofseyer, J J, 'Talking Liberty with John Stuart Mill' [1999] *Annual Survey of American Law* 395.
- Paciocco, D M, 'Subjective and Objective Standards of Fault for Offences and Defences' (1995) 59 *Saskatchewan Law Review* 271.
- Palmer, G, 'Privacy and the Law' [1975] *New Zealand Law Journal* 747.
- Pannick, D and Lester, A, 'The Impact of the Human Rights Act on Private Law: The Knight's Move' (2000) 116 *Law Quarterly Review* 380.
- Paradis, D P, 'Bartnicki v Vopper: Cell Phones and Throwing Stones' (2003) 37 *New England Law Review* 1117.
- Paton-Simpson, E, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305.
- Pedersen, B L, 'Florida Star v B J F: The Rape of the Right to Privacy' (1990) 23 *John Marshall Law Review* 731.
- Peikoff, A L, 'The Right to Privacy: Contemporary Reductionists and their Critics' (2006) 13 *Virginia Journal of Social Policy and the Law* 474.
- Perry, S R, 'The Mixed Conception of Corrective Justice' (1992) 15 *Harvard Journal of Law and Public Policy* 917.
- Phillipson, G, 'Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously' (2003) *European Human Rights Law Review* (Special Edition) 54.
- Phillipson, G, 'The Human Rights Act, 'Horizontal effect' and the Common Law: a Bang or a Whimper' (1999) 62 *Modern Law Review* 824.
- Phillipson, G, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726.
- Poole, T, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 *Oxford Journal of Legal Studies* 435.
- Post, R C and Siegel, R, 'Originalism as a political Practice: The Right's Living Constitution' (2006) 75 *Fordham Law Review* 545.
- Post, R C, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 *California Law Review* 957.
- Post, R C, 'Three Concepts of Privacy' (2001) 89 *Georgetown Law Journal* 2087.
- Postema, G J, 'Risks, Wrongs and Responsibility – Coleman's Liberal Theory of Commutative Justice' (1993) 103 *Yale Law Journal* 861.

- Power, H, 'Provocation and Culture' [2006] *Criminal Law Review* 871.
- Prosser, W L, 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1.
- Prosser, W L, 'Privacy' (1960) 48 *California Law Review* 383.
- Rabban, D M, 'The Emergence of Modern First Amendment Doctrine' (1983) 50 *University of Chicago Law Review* 1205.
- Ragland, G, 'The Right of Privacy' (1929) 17 *Kentucky Law Journal* 85.
- Rappaport, A J, 'Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy' [2001] *Utah Law Review* 441.
- Reed, T A, 'Holmes and the Paths of the Law' (1993) 37 *American Journal of Legal History* 273.
- Richards, D A, 'Public and Private in the Discourse of the First Amendment' (2000) 12 *Cardozo Studies in Law and Literature* 61.
- Richards, N M, 'Reconciling Data Privacy and the First Amendment' (2005) 52 *UCLA Law Review* 1149.
- Richards, N M, 'The Information Privacy Law Project' (2006) 94 *Georgetown Law Journal* 1087.
- Richards, N M and Solove, D J, 'Privacy's other Path: Recovering the law of Confidentiality' (2007) 96 *Georgetown Law Journal* 123.
- Richardson, M 'Privacy and Precedent: The Court of Appeal's Decision in Hosking v Runtig' (2005) 11 *New Zealand Business Law Quarterly* 82.
- Richardson, M, 'The Private Life after Douglas v Hello!' [2003] *Singapore Journal of Legal Studies* 311.
- Richardson, M, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26 *Melbourne University Law Review* 381.
- Rishworth, P, 'Review: Human Rights' [2005] *New Zealand Law Review* 87.
- Rolfs, J R, 'The Florida Star v B J F: The Beginning of the End for the Tort of Public Disclosure' [1990] *Wisconsin Law Review* 1107.
- Rosen, J, 'Continental Divide' [2004] *Legal Affairs* 49.
- Rosen, J, 'The Purposes of Privacy: A Response' (2001) 89 *Georgetown Law Journal* 2117.
- Roth, P, 'Unlawful Photography in Public Places: the New Zealand Position' [2006] PLPR 2 available at <http://www.austlii.edu.au/au/journals/PLPR/2006/2.html>, at 23 February 2007.
- Rothenberg, L E, 'Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space' (2000) 49 *American University Law Review* 1127.
- Rothstein, L E, 'Privacy or Dignity? Electronic Monitoring in the Workplace' (2000) 19 *New York Law School Journal of International and Comparative Law* 379.
- Rubinfeld, J, 'The First Amendment's Purpose' (2001) 53 *Stanford Law Review* 767.
- Ruckdaschel-Haley, K, 'The Florida Star v B J F: Balancing Freedom of the Press and the Right to Privacy upon Publication of a Rape Victim's Identity' (1990) 35 *South Dakota Law Review* 94.

- Samuel, G, 'The impact of European integration on private law - a comment' (1998) 18(2) *Legal Studies* 167.
- Sandeen, S K, 'Relative Privacy: What Privacy Advocates Can Learn From Trade Secret Law' [2006] *Michigan State Law Review* 667.
- Schadrack, M, 'Privacy and the Press: A Necessary Tension' (1985) 18 *Loyola of Los Angeles Law Review* 949.
- Sebok, A J, 'Misunderstanding Positivism' (1995) 93 *Michigan Law Review* 2054.
- Schreiber, A, 'Confidence Crisis, Privacy Phobia: Why Invasion of Privacy Should Independently recognised in English Law' [2006] *Intellectual Property Quarterly* 160.
- Scott, S M, 'The Hidden First Amendment Values of Privacy' (1996) 71 *Washington Law Review* 683
- Sedley, Lord (Stephen), 'Sex, Libels and Video-surveillance' (The Blackstone Lecture 2006)' <www.judiciary.gov.uk/publications_media/speeches/2006/sp130506> 16 January 2008.
- Seidelson, D E, 'Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent' (1981) 50 *George Washington Law Review* 17.
- Shapiro, S J, 'What is the Internal Point of View?' (2006) 75 *Fordham Law Review* 1157.
- Simons, K W, 'Rethinking Mental States' (1992) 72 *Boston University Law Review* 463.
- Sims, A, "'A Shift in the Gravity Centre": The dangers of Protecting Privacy through Breach of Confidence' [2005] *Intellectual Property Quarterly* 27.
- Smillie, J, 'Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand' [1996] *New Zealand Law Review* 254.
- Smillie, J, 'The Future of Negligence' (2007) 15 *Tort Law Journal* 300.
- Smolla, R A, 'Accounting for the Slow Growth of American Privacy Law' (2002) 27 *Nova Law Review* 289.
- Smolla, R A, 'Information as a Contraband: The First Amendment and Liability for Trafficking in Speech' (2002) 96 *Northwestern University Law Review* 1099.
- Smolla, R A, 'Privacy and the First Amendment Right to Gather News' (1999) 67 *George Washington Law Review* 1097.
- Singer, J W, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' [1982] *Wisconsin Law Review* 975.
- Siprut, J, 'Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places' (2006) 33 *Pepperdine Law Review* 311.
- Solove, D J, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477
- Solove, D J, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087.
- Solove, D J, 'The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure' (2003) 53 *Duke Law Journal* 967.

- Spencer, S B, 'Reasonable Expectations and the Erosion of Privacy' (2002) 39 *San Diego Law Review* 843.
- Steyn, Lord (Johan), '2000 - 2005: Laying the Foundations of Human Rights Law in the United Kingdom' [2005] *European Human Rights Law Review* 349.
- Steyn, Lord (Johan), 'Democracy through Law' [2002] *European Human Rights Law Review* 723.
- Strauss, D A, 'Rights and the System of Freedom of Expression' [1993] *University of Chicago Legal Forum* 197.
- Summers, R S, 'How Law is Formal and Why it Matters' (1997) 82 *Cornell Law Review* 1165.
- Summers, R S, 'On Identifying and Reconstructing a General Legal Theory – Some Thoughts Prompted by Professor Moore's Critique' (1984) 69 *Cornell Law Review* 1014.
- Summers, R S, 'Pragmatic Instrumentalism in Twentieth Century Legal Thought – A Synthesis and Critique of our Dominant Legal Theory about the Law and its Use' (1980-81) 66 *Cornell Law Review* 861.
- Sunstein, C R, 'On Analogical Reasoning' (1993) 106 *Harvard Law Review* 741.
- Taslitz, A, 'The Fourth Amendment in the Twenty-First Century: Technology, Privacy and Human Emotions' (2002) 65 *Law and Contemporary Problems* 125.
- Thomas, E W, 'A Return to Principle in Judicial Reasoning and an Acclamation of judicial Autonomy' (1993) 23 *Victoria University of Wellington Law Review Monograph* 5.
- Tiritilli, E W, 'You Never Call Me Anymore: Bartnicki v Vopper and the Supreme Court's Abridgement of the Right of Privacy in Favor of the First Amendment Right of a Free Press' (2002) 35 *Creighton Law Review* 729.
- Tison, E, 'Straddling the Fence: Justice Breyer's concurrence in Bartnicki v Vopper gives Protection of Privacy and still Manages to Protect the Press: Bartnicki v Vopper, 532 US 514 (2001)' (2003) 27 *Southern Illinois University Law Journal* 661.
- Tobin, R, 'Privacy: One step forward, two steps back' [2003] *New Zealand Law Journal* 256.
- Tobin, R, 'Yes, Virginia, there is a Santa Claus: the tort of invasion of privacy in New Zealand' (2004) 12 *Tort Law Journal* 95.
- Todd, S, 'Review: Tort' [2004] *New Zealand Law Review* 585.
- Todd, S, 'Twenty Years of Professional Negligence in New Zealand' (2005) 21(4) *Professional Negligence* 257.
- Tushnet, M, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363.
- Twining, W, 'Other People's Power: The Bad Man and English Positivism, 1897-1997' (1997) 63 *Brooklyn Law Review* 189, 195 (1997).
- Vickery, A B, 'Breach of Confidence: An Emerging Tort' (1982) 82 *Columbia Law Review* 1426.
- Volokh, E, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You' (2000) 52 *Stanford Law Review* 1049.
- Wade, Sir H W R, 'Horizons of Horizontality' (2000) 116 *Law Quarterly Review* 217.
- Wagner De Cew, J, 'The Scope of Privacy in Law and Ethics' (1986) 5 *Law and Philosophy* 145.

- Warren, S D and Brandeis, L D, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.
- Waterfield, M 'Now You See It, Now You Don't: the Case for a Tort of Infringement of Privacy in New Zealand' (2004) 10 *Canterbury Law Review* 182.
- Weinrib, E J, 'Causation and Wrongdoing' (1987) 63 *Chicago Kent Law Review* 407.
- Weinrib, E J, 'Corrective Justice' (1992) 77 *Iowa Law Review* 403.
- Weinrib, E J, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 *Theoretical Inquiries in Law* 107.
- Weinrib, E J, 'Understanding Tort Law' (1989) 23 *Valparaiso University Law Review* 485.
- Wells, C E, 'Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence' (1997) 32 *Harvard Civil Rights-Civil Liberties Law Review* 159.
- Wells, C P, 'Reinventing Holmes: The Hidden, Inner, Life of a Cynical, Detached, Ambitious and Fascistic old Judge without Values' (2002) 37 *Tulsa Law Review* 801.
- Weston, N A, 'The Metaphysics of Modern Tort Theory' (1994) 28 *Valparaiso University Law Review* 919, 989.
- Whitman, J Q, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151.
- Wilson, J, 'Media Law Symposium: Prior Restraint of the Press' [2006] *New Zealand Law Review* 551.
- Woito, L N and McNulty, P, 'The Privacy Disclosure Tort and the First Amendment: Should the Community decide Newsworthiness?' (1979) 64 *Iowa Law Review* 185.
- Worley, D M, 'Shulman v Group W Productions: Invasion of Privacy by Publication of Private Facts - Where Does California Draw the Line between Newsworthy Information and Morbid Curiosity' (1999-2000) 27 *Western State University Law Review* 535.
- Young, A L, 'Remedial and Substantive Horizontality: The Common Law and Douglas v Hello! Ltd' [2002] *Public Law* 232.
- Zimmerman, D L, 'Who put the Right into the Right of Publicity' (1998) 9 *DePaul University Journal of Art and Entertainment Law* 35.
- Zimmerman, D L, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291.
- Zipursky, B C, 'Rawls in Tort Theory: Themes and Counter-themes' (2004) 72 *Fordham Law Review* 1923.
- Zipursky, B C, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 *Vanderbilt Law Review* 1.
- Zipursky, BC, 'Ten Half-Truths about Tort Law' (2008) 42 *Valparaiso Law Review* 1221.

Governmental Sources

- Hickford, M, 'A Conceptual Approach to Privacy' New Zealand Law Commission M P19.
- Law Reform Commission of Hong Kong, Report: Privacy and Media Intrusion (2004).

Law Reform Commission of New South Wales, Consultation Paper 1 (2007) – Invasion of Privacy.

New Zealand Law Commission, Privacy: concepts and issues: review of the Law of Privacy part 1 (Study Paper; 19).

Other Sources

‘Appointing Judges: A Judicial Appointments commission for New Zealand – Appendix One: New Zealand Appointments’ <<http://www.justice.govt.nz/pubs/reports/2004/judicial-appointment/appendixone.html>> 03 December 2006.

‘Brash case rings alarm bells for media’
<<http://www.stuff.co.nz/stuff/print/0,1478,3866249a6160,00.html>> 24 November 2006>.

Black, J, ‘Privacy: To every attack a Defence’ published on 22 July 2003 in Business Newsweek
<http://www.businessweek.com/technology/content/jul2003/tc20030722_9870_PG3_tc125.htm> 02 December 2006.

‘Egalitarianism’ in Stanford Encyclopaedia of Philosophy
<<http://plato.stanford.edu/entries/egalitarianism/>> 08 March 2008>.

Haywood, D, ‘Bill of Rights unlikely to grow up’ printed in the New Zealand Herald on 28 August 2006.

McPhail, D, ‘Jerry’s excuse a wee bit wet’ printed in The Christchurch Press, 15 July 2006 (D8).

Shorter Oxford Dictionary (5th ed, 2002) Vol 1.

Smith, T ‘Collins not the first to be caught short in sport’ printed in The Christchurch Press, 15 July 2006 (F2 Sports).

Statistics New Zealand – Tatauranga Aotearoa <<http://www.stats.govt.nz/analytical-reports/children-in-nz/growing-ethnic-diversity.htm>> 03 December 2006.